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Supreme Court, U.S.
FILED

03 - 31 JUL 2 - 2003

No. 02-

In The
Supreme Court of the United States

Michael McNeill,

Petitioner

v.

Town of Paradise Valley, an Arizona Town; Elsa Lynch, Paradise Valley Municipal Court Judge and an individual; Jill Kennedy, Former Paradise Valley Town Prosecutor and an individual; Sherwood Johnston III, Town of Paradise Valley Hearing Officer and an individual; Mike Coppola, Paradise Valley Police Officer and an individual;

Respondents

On Petition for a Writ of Certiorari
to the Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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118 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether or not Photo Radar complaint and summons to appear thereon violated Petitioner's Constitutional Rights.

2. Whether or not defendant Judge, hearing officer, Prosecutor and/or Police office are immune from suit.

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OPINIONS BELOW

The opinion and order of the United States court of appeals appears at Appendix IV to the petition and is unpublished.

The order of the United States district court on Motion to Dismiss Docket No. 45 appears at Appendix I to the Petition and is unpublished.

The order of the United States district court on Motion for Summary Judgment Docket No. 127 appears at Appendix II to the petition and is unpublished.

The order of the United States district court on Motion for Summary Judgment Docket No. 148 appears at Appendix III to the petition and is unpublished.

JURISDICTIONAL STATEMENT

In its decision filed August 19, 2002 the United States Court of Appeals (9th cir.) denied Plaintiff/Appellant's appeal. (Appendix IV).

A timely petition for rehearing and rehearing in banc was denied by the United States Court of Appeals (9th cir.) in its decision filed March 4, 2003 and a copy of that order denying rehearing appears at Appendix IV.

An extension of time of time to file the petition for writ of certiorari was granted to and including July 2, 2003 on May 21, 2003 in Application No. 02A981.

This jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDANCES AND REGULATIONS [1]

UNITED STATE CONSTITUTION:
Fourth Amendment.
Fifth Amendment.
Eighth Amendment.
Ninth Amendment.
Thirteenth Amendment.
Fourteenth Amendment.
ARIZONA CONSTITUTION:
Article III
Article IV
STATUTES:
42 U.S.C. 1983
Fed. R. Civ. P. 56C
ARS Sec. 28-1062
ARS Sec. 28-1561
PARADISE VALLEY TOWN CODE
Paradise Valley Town Code Sec.11-2-18

STATEMENT OF THE CASE

Respondents served Petitioner by regular mail a photo radar traffic complaint in August of 1997. Respondents again served Petitioner on October 31, 1997 by certified mail a photo radar traffic complaint and a **subpoena,** (same envelope) requiring Petitioner to testify for the state. The complaint bears a computer generated printed name; it is not signed by issuing officer nor is any certification attached to the complaint nor was any certification in the court record of State of Arizona v. Michael McNeill Case No. 223473A (Court Record "Doc." 102 exhs. E, I and J; doc. 129 exh. 1 to exh. A pp. 114, 115, 116, 136, 137; Appendix II pp. 6, 7, 8).

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[1] Federal and state constitutional provisions, statutes and codes listed on this page appear in Appendix VII..

Arizona's Constitution, Articles III (Distribution of Powers) and IV (vested the legislative authority of the State to Arizona to the Arizona Legislature. Arizona Statutes (ARS Sec 28- 1062 renumbered 1561) requires a certification under penalty of perjury by issuing officer for valid traffic complaint to issue. The Paradise Valley Town Code 11-2-18 (a) tramples on the Arizona Constitution and eviscerates from the Federal Constitution protections the framers intended all citizens enjoy. The Town Code (Appendix VII) allows for photo radar complaints based upon a magistrates persuasion; said magistrates also tries the matter. The Town Code **does not** require issuing officer certify photo radar complaints under penalty of perjury. (Appendix VII). Petitioner filed his Complaint for deprivation of civil rights Re: 42 USC 1983 and racketeering Re: 18 USCA 1962 on February 22, 1999. (Doc. 1).

Petitioner filed his First Amended Complaint on June 6, 1999 alleging violations of his Fourth, Fifth, Eighth, Ninth, Thirteenth and Fourteenth Amendment civil rights Re: 42 USC 1983 and for Racketeering Re: 18 USCA 1962 against named real/natural person defendants. Petitioner further alleged photo radar complaints are not valid and that the court lacked jurisdiction to issue its process. (Doc. 25).

The custom and practice of respondent Town is to have its agent/employees issue photo radar complaint solely to registered owners of vehicles including corporations where it is metaphysically impossible for said corporation/ companies to violate ARS Sec. 28-701A by operating a vehicle at a speed that is greater than reasonable and prudent. The custom and practice of respondent Town is to have defendant registered owners identify the actual driver of suspect vehicles; thus the subpoena to Petitioner requiring him to testify for the State. (Doc. 102 exhs. E, I and J; doc. 129 pp. 114, 115, 116, 136, 137; Also See: Appendix IX; *Tonner v. Paradise Valley*, 171 Ariz. 449, 831 P.2d 448 (Ariz.App.Div.1

1992). The court dismissed Petitioner's claims against respondents Lynch, Kennedy and Johnston on grounds of judicial and prosecutorial immunity. (Docs. 38, 45). Subsequently the Court dismissed Appellant's civil rights claims against Coppela. (Doc. 74).

Respondents moved for summary judgment filed on December 12, 00 (Doc. 102). Petitioner filed a cross motion on. (Doc. 105). At time Fed.R.Civ.P. 56(c) motions were heard, no admissible certification was before the court entitling Plaintiff to summary judgment on issue of invalid complaint (Appendix II pp. 6, 7, 8) The court granted defendant's motion on all issues save Fourth Amendment issues. (Doc. 127).

Respondents moved for summary judgment on Fourth Amendment issues filed on June 15, 01 (Doc. 133). Petitioner filed a cross motion for summary judgment on July 17, 01 (CR 142). The court considered Petitioner's cross motion as a response and granted defendant's motion. (Doc. 148). The Court's final judgment entered on August 15, 2001. (Doc. 149). The district court had jurisdiction pursuant to 28 USC 1331(a). Petitioner timely filed his Notice of Appeal on September 7, 2001. (Doc. 152). The Court of Appeals (9th cir.) on August 19, 2002 denied Petitioners appeal and on March 4, 2003 denied Petitioners motion for rehearing and rehearing in banc.

REASONS FOR GRANTING THIS PETITION

The opinions below ignored **Fed.R.Civ.P.56(c)**, violate Article III of the Arizona Constitution, **Distribution of Powers,** and reject Article IV of the Arizona Constitution vesting to the Arizona Legislature **exclusive authority to Legislate for the State** all of which calls for this Court to exercise its supervisory powers.

ARGUMENT

THE PARADISE VALLEY TOWN CODE SEC. 11-2-18A IS UNCONSTITUTIONAL

Petitioner's arguments rely upon the Federal and State Constitutions, related authorities and Arizona Statutes and Authorities. [2]

DISTRIBUTION OF POWERS

> The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and, except as provided by the Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise powers properly belonging to either of the others.

Arizona Constitution Article III.

> The legislative authority of the State shall be vested in a legislature, consisting of a Senate and a House of Representatives, but the people reserve the power to propose laws and amendments to the Constitution and to enact or reject such laws and amendments at the polls, independently of the Legislature; and they reserve, for use at their option, the power to approve or reject at the polls any Act, or item, section, or part of any Act, of the Legislature.

Arizona Constitution Article IV Sec. 1

[2] Except in matters governed by the Federal Constitution or by the acts of Congress, the law to be applied in any case is the law of the state. Erie Railroad v. Thompkins, 304 U.S., 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938).

The legally elected representatives of the people, enacted the following statute:

> A. Uniform traffic complaint forms need not be sworn to if they contain a form of certification by the issuing officer in substance as follows: '"I hereby certify that I have reasonable grounds to believe and do believe that the person named herein committed the offense or civil violation described herein contrary to law."' B. A false certification under the provisions of subsection A constitutes perjury.

ARS Sec. 28-1062 [3]

Paradise Valley's circumvention of ARS 28-1062, is illuminated in its following Town Code:

> A. ...if any vehicle has been driven in violation of the speed restrictions of this Article or Title 28 Chapter 6, Article 6 of the Arizona Revised Statutes or A.R.S. 28-797 the proof of identity of the person in whose name the vehicle is registered pursuant to Title 28, Chapter 3 of the Arizona Revised Statutes may be sufficient evidence that such person was responsible for such violation, in absence of probative contrary evidence and if the magistrate is so persuaded . . . The registered owner of such violation, if not the person responsible for such violation, shall upon request inform the magistrate or Town attorney of the identity of the person responsible for such violation, if known.

Paradise Valley Town Code Sec.11-2-18A and C.
(Aso See: doc 127 p. 13 ll 27-28).

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[3] Renumbered effective Oct. 1, 1997 from 28-1062 to 28-1561 the Legislature changed one (1) word in subsection B; from ("constitutes" perjury) in 1062 to ("is" perjury) in 1561.

The Town Code eliminates the legislatures requirement of a traffic complaint signed by issuing officer under penalty of perjury. Pursuant to the Town Code photo radar complaints issue predicated upon a magistrate persuasion absent probative contrary evidence; of course, such evidence never exists. Photo Radar complaints allege violations of ARS Sec. 28-701A. For well over a decade Paradise Valley has been issuing Photo Radar complaints to corporations. [4] [5] (Also See: Appendix IX). ARS Sec. 28- 1062/1561 does not allow corporations to be ticketed as drivers of speeding vehicles.

Where the subject is of local interest, or city charter confers express power to legislate, both state and city may legislate on same subject, but where subject of legislation is of statewide concern, and the legislature has acted, its

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[4]

> A person shall not drive a vehicle on a highway at a speed greater than is reasonable and prudent under the circumstances, conditions and actual potential hazards then existing. A person shall control the speed of a vehicle as necessary to avoid colliding with any object, person, vehicle or other conveyance on, entering or adjacent to the highway in compliance with legal requirements and the duty of all persons to exercise reasonable care for the protection of others.

(ARS Sec. 28-701A).

[5]

> On February 11, 1990, the photo radar devise operated by the Town of Paradise Valley detected a vehicle registered to General Motors Acceptance Corporation ("GMAC") traveling at an alleged speed of fifty-six miles per hour in a forty mile per our zone. A summons and were mailed to GMAC alleging a violation of Ariz. Rev. Stat. Ann.("A.R.S.") Sec. 28-701 (1989), driving at a speed greater than is reasonable and prudent. GMAC forwarded the summons to appellee and his wife, the lessees of the vehicle. GMAC also sent the Paradise Valley Magistrate's Court a copy of its transmittal letter to appellee. The summons and traffic complaint were reissued, naming Tonner as the defendant and the infraction of section 28-701.

Tonner v. Paradise Valley, 171 Ariz. 449, 831 P.2d 448 (Ariz.App.Div.1 1992).

declaration is binding throughout state. *Keller v. State* 46 Ariz. 106, 47 p.2d442 (1935).

In Paradise Valley the magistrate(s), who pursuant to the Town Code must be convinced the person responsible is the registered owner for a photo radar complaint to issue, are the magistrates who sit in judgment at trial. Petitioner's affidavit, (uncontroverted), fully documents the events in the Paradise Valley Court on February 23, 1998 where defendant judge Lynch 1) ignored Petitioner's motions to dismiss, 2) would not allow Petitioner to speak, 3) ordered police officers to remove Petitioner from the courtroom never having made a ruling, 4) obstructed justice by destroying evidence, and 5) where police officers had Petitioner surrounded at the clerk of the court's window caused Petitioner to be in fear of his life. (Appendix VIII; Doc. 106 Exh. 1) [6]

In commenting on of Petitioners Forth Amendment rights the court of appeals stated: "Additionally, because McNeill successfully challenged the citation in municipal court, he received all the process he was due." This conflicts with *Ward v. Village of Monroeville* 409 U.S. 57, 93S.Ct. 80, 34 L.Ed. 2nd 267(1972) where this Court stated: "Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance." Id.

Pursuant to the Fourteenth Amendment, Petitioner and all citizens are entitled to due process and the equal protection of the laws enacted by the Arizona State Legislature. The Town Code denies citizens their Fourteenth Amendment civil rights; the Town Code Sec. 11-2-18A is on its face, demonstrably unconstitutional!

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[6] Petitioner's Affidavit, Appendix V, Cr 106 Exh. 1 is incorporated herein by this reference made a part here of as though fully stated.

JURISDICTIONAL PREQUISITE REQUIRES COMPLAINT CERTIFIED ACCORDING TO LAW

The Photo Radar Complaint issued to Petitioner Was Not Certified As Required by Arizona Statutes And Authorities For Valid Complaint To Issue

In Arizona, a typical traffic complaint is a post arrest complaint and when signed by issuing officer under penalty of perjury, gives to the traffic court or justice of the peace jurisdiction. *Cf State Ex Rel Purcell v Superior Court 109 Ariz. 460, 511 P.2d 642 Ariz. S.Ct. in banc (1973).*

A.R.S. Sec. 28-1062A requires that traffic ticket complaints contain a certification, subject to perjury, by issuing officer that officer has reasonable grounds to believe that the individual list on the complaint committed the offense. See: *Baumert v. Municipal Court for the City of Phoenix,* 119 Ariz. 142,144, 579 P.2d 1112, 1114 (App 1978); *Sweitzer v. Department of transportation, Motor Vehicle Division,* 536, 537, 683 P.2d 335(App.1984).

The case of *People v. Harding,* 34 Ill. 2d 475, 480, 216 N.E. 2d 147, 151-52 (1966), cited *in State v. ex rel. Purcell v. Superior Court in and for Maricopa County,* 109 Ariz. 460, 511 P.2d 642(1973), decided the same issue stated herein (statutory provisions require certification of a uniform traffic complaint as a jurisdictional prerequisite).

> [U]ntil a court acquires jurisdiction of a case through the filing of a legal complaint, affidavit or other form of charge, neither it nor anyone else has power or authority to issue its process. Legal process is issued by courts, not police officers. Entitling a paper a 'summons' (or citation) does not invest it with the efficacy and legal status of such process, nor does its title transform it into something which it is not. *City of Mercer Island v. Crouch,* 12 Wash. App. 472, 476, 530 P.2d 344 quoting Donigan & Fisher, Courts

View the Uniform Citation and Complaint, Traffic Dig. & Rev. 32 at 38 (July 1961)

People v. Harding, 34 Ill. 2d 475, 480, 216 N.E. 2d 147, 151-52 (1966)

Any person did not sign the photo radar complaint issued to Petitioner; a **computer generated** name is printed upon said complaint. (Appendix VI Par. 8; Cr doc. 102 exhibit E an D). The district court at doc. 127 p. 7 –14 through p. 8-25 documents the above facts and Petitioner's objections to said exhibits E and D. (Appendix II pp. 6, 7, 8).

The long and short of the court opinion is:

1) Over ruled Petitioner's objections to exhibit E to wit. "Exhibit E, a copy of a ticket issued to McNeill, speaks for itself";
2) The court admitted the complaint was not certified and there was not a certification of the complaint in a certified copy Paradise Valley Municipal Court files in case number 223473 A to wit: "Exhibit D is not among the 81 page file."

(Appendix II). Herein lies the crux of the matter. [7, 8]

[7] Defendants Lynch, Johnson, Kennedy and Coppela are agents of defendant Town of Paradise Valley who while acting as agents for, and conforming to Town of Paradise Valley's official policy, custom, regulation, rule or practice and in violation of clearly established law caused McNeill to suffer a deprivation of McNeill's Fourth, Fifth, Eighth, Ninth, Thirteenth and Fourteenth Amendment Civil Rights."(First Amended Complaint, Doc. 25 Par. IX).

[8] With deliberate indifference to McNeill's Constitutional Rights, it is the official policy, custom or practice of defendant Town of Paradise Valley to use, promote the use, or contract to use **"Photo Radar"** where in violation of clearly established law defendants issue traffic ticket complaints and summons to appear thereon, where the traffic ticket complaint is not valid, and The court issuing summons does not have jurisdiction, and that

> It is true that a computer-generated facsimile signature is presumed to be a valid certification absent contrary evidence. *Irving* , 165 Ariz. at 225, 797 P.2d 1243. It is also true that some indicia of the requisite "human involvement" must be apparent from the face of the document or, for the foregoing reasons, the computer-generated facsimile signature, standing alone, will fail.

State v. Johnson 184 Ariz. 521, 911 P.2d 527 (App.1994) at 184 Ariz 525 (Reconsideration denied Aug. 2, 1995, Review denied Feb. 21, 1996); Also See: 184 Ariz. 521, 523 B [4]. [9, 10]

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policy, custom or practice is the proximate cause of McNeill's damages. (First Amended Complaint, doc. 25 Par. X).

[9] The district court at doc. 127 p. 7 –14 through p. 8-25 (Appendix II) speaks to the record in the Paradise Valley Municipal Court which does not appear in the district court record at the time the court's order doc. 127 appears in the record. Because of these irregularities and others Plaintiff McNeill filed a motion to strike the Paradise Valley Court Record and his objections to the court ordering same to be produced. (Doc. 120). Defendant's response to said motions (doc. 129) does contain a copy of the Paradise Valley court record. Exhibit A to doc. 127 shows that exh. 1 to exh. A is the Paradise Valley court record referred to by the court at doc.127 p. 7 –14 through p. 8-25.

[10] In Appellant's Opening Brief, Issues Presented Paragraph 4 (d) Appellant McNeill asked: "Whether or not the trial court denied McNeill a fair trial". Summary judgment is to be entered based upon the record before the court at time motion is heard. Fed.R.Civ.P. 56 (c) (Appendix VII). There being no admissible certification of the photo radar complaint before the court and there being no genuine issue of material fact, Plaintiff McNeill was entitled to judgment in his favor as to the issue of defendants lack of jurisdiction when issuing the court's process on invalid complaint to Plaintiff.

> [A]dditional foundation is required to establish requisite "human involvement" which entitles the offeror to the **statutory presumption.** *See generally* 5 Wigmore, *Evidence* Sec. 1635 (Chadbourn rev. 1975) . . . Additionally, the necessary human element would be established with some indicia on the face of the document, for instance as in *Barkley*, that the certification process was not totally computer driven. (emphasis added).

Id. 184 Ariz. 526.

There is no statutory presumption allowing for the self-authentication of traffic complaints in the State of Arizona. ARS Sec. 28-110 subd. F addressed by the court in *State v. Johnson*, 184 Ariz. 521, 523 B [4], provided for the self authentication Motor Vehicle Division ("DMV") records to do away with necessity of someone from the DMV appearing in court to certify records. (ARS Sec. 28-110 subd. F). Further if self-authentication of traffic complaints were allowed, said certification would fail as a matter of law; "human involvement" must be apparent from the face of the document or, for the foregoing reasons, the computer-generated facsimile signature, standing alone, will fail. *State v. Johnson, Supra.*

In one fell swoop Paradise Valley avoids the requirements of the legislature as stated in the statutes for a valid complaint to issue, that being a complaint certified under penalty of perjury by issuing officer; instead photo radar complaints issue pursuant to an unconstitutional Town Code to registered owners if a magistrate is persuaded the registered owner is responsible. Id. 184 Ariz. 521, 523 B [4]. (ARS Sec. 1062/1561; Paradise Valley Town Code Sec.11-2-18A). Courts issue process. *People v. Harding* 34 Ill. 2d 475, 480, 216 N.E. 2d 147, 151-52 (1966) A perquisite for a court to have jurisdiction is a valid complaint.

People v. Harding, Supra; State Ex Rel Purcell v Superior Court, Supra. In Arizona for a valid traffic complaint to issue the complaint must be certified under penalty of perjury. ARS Sec. 28- 1062/1561; *State Ex Rel Purcell v Superior Court, Supra; Baumert v. Municipal Court for the City of Phoenix,Supra; Sweitzer v. Department of transportation, Motor Vehicle Division; Supra.* ARS Sec. 28 1062/1561 is binding throughout the State of Arizona including Paradise Valley. *Keller v. State, supra; Arizona constitution Art. III, IV.* The complaint was not signed by issuing officer. (Doc. 102 exh. E; doc. 129, exh. A to exh. 1 p. 103). No certification of the complaint existed in the record of the Paradise Valley municipal court. (Appendix II pp. 6, 7, 8, doc. 127 p. 7 –14 through p. 8-25 ; doc. 129 exh A, to exh. 1). The Paradise Valley magistrates court wanted jurisdiction when issuing its process ordering Petitioner to appear on "photo radar" complaint not certified in accordance with Arizona Statutes.

DEFENDANT JUDGE, HEARING OFFICER, PROSECUTOR AND POLICE OFFICER ARE NOT IMMUNINE FROM SUIT

Judges are not immune from suit when acting in clear absence of all jurisdiction. *Stump v. Sparkman,* 435 US 349 (1978). The Paradise Valley municipal court **does not** have jurisdiction over "photo radar" complaints issued pursuant to an unconstitutional Town Code. Paradise Valley approved a Town Code that directly and intentionally violates statutes enacted by the lawfully elected representatives of the people and in so doing illegally usurped powers belonging solely the Arizona Legislature. Usurping power, then claiming photo radar complaints are complaints authorized by the legislature endowing magistrate courts with subject matter jurisdiction predicated upon the first unconstitutional act is obscene, repugnant, and a vile perversion of the rule of law and is constitutionally unaccept-

able. Usurping jurisdiction is treason to the United States constitution. *Reaich v Truax, 219 F. 273, 284 (1915).* When a prosecutor performs the investigative functions normally performed by a detective or police officer, it, is "neither appropriate nor justifiable that, for the same act, immunity should protect one and not the other." *Buckley v. Fitzsimmons,* 509 U.S. 259, 274 125 Led 2d 209, 113 S. Ct. 2606 (1993). The prosecutor's office served Petitioner with a subpoena to testify for the State. (Doc. 102 exh. I; doc. 129 pp. 114, 115, 116, 136, 137; Appendix II P.6 re: exh. J; Appendix VIII P.4 PP.11). Identifying drivers, allegedly guilty of speeding is a function normally performed by a detective or police officer; the prosecutor did not automatically have absolute immunity. Further, any act performed by the prosecutor pursuant to an unconstitutional Town Code, there being no valid complaint, could not be an act normally performed by prosecutors. Petitioners racketeering claims against all real/natural person defendants are actionable, just and are not precluded by a defense of absolute nor qualified immunities. Az. Cont. Arts. III, IV; U. S. Const. 14th Amend.

THE TOWN OF PARADISE VALLEY IS LIABLE FOR VIOLATIONS OF PETITIONER'S FOURTH, FIFTH, EIGHTH, NINTH, THIRTEENTH AND FOURTHTEENTH AMENDMENT CIVIL RIGHTS

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except

that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. Sec. 1983

Petitioner's Fourteenth amendment civil rights to due process and equal protection of the laws were violated as discussed above: This done pursuant to an unconstitutional Town Code. It is the custom of respondent Town as stated in its Town Code to have its agents and employees violate the civil rights of citizens when issuing "Photo Radar" complaints and further violate said civil rights when compelling them to appear and defend. Respondent Town having indoctrinated its agent/employees in the art, practice and custom of violating citizens civil rights is liable for all civil rights violations suffered by citizens at the hands of said agent/employees, where said violations were committed for the purpose of supporting, promoting, and enforcing said unconstitutional Town Code.

Petitioner was surrounded by police officers at the Clerk of the Court's window and placed in fear of his life. (Appendix VII).[11] Petitioner was under arrest and a prisoner. The eighth amendment forbids cruel and unusal punishment. Prisoners have eighth amendment protection. *Cf Hudson v. McMillian et. Al. 503 U.S. 1, 112 S. Ct. 995 (1992).* Injuries need not be physical or visible. Id. Phsychological

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[11] "Viewed objectively, Morgan was placed under arrest, without the issuance of a warrant, at the moment the police encircled the Morgan residence." United States v. Azzawy,784 F.2d 1158, 1164 (9th Cir. 1885) Also See: footnote 5.

harm might prove to be cruel and unusual punishment. Id. at 112 S. Ct. 1004 paragraph II, concurring opinion of Justice Blackmun. Petitioner is entitled to eighth amendment protection. "Excessive bail shall not be required, nor excessive fines be imposed, nor cruel and unusual punishments inflicted." (United States Constitution, Eighth Amendment). Surrounding Petitioner and placing him in fear of his life and forcing him to leave on pain of death, places he had a legal right to be and occupy because he refused to capitulate to corrupt public officials violated Petitioner's Fourth, Fifth Eighth and Fourteenth Amendment civil rights. Respondent's actions constitute a further violation of Petitioner's Fourth amendment civil rights.

Arizona sets a high standard for issuing traffic complaints. Issuing officer must certify under penalty of perjury to: a) to having reasonable grounds to believe and that the person named committed the offense or civil violation described herein contrary to law, and b) believing that the person named committed the offense or civil violation described herein contrary to law. ARS Sec. 28-1062/1561. In Arizona stopping a vehicle constitutes an arrest of the driver. [12] Arizona requires probable cause to issue a traffic complaint. [13] Respondents denied Petitioner his absolute right to be lawfully arrested and be issued a traffic complaint predicated upon reasonable grounds/probable cause Thereby violating petitioner's Fourth, Fifth and fourteenth Amendment civil rights. (See: footnotes 6, 9 and 10).

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[12] When a driver is accosted by police and stopped on a highway, his freedom was restrained and he was "seized" within meaning of U.S.C.A. Const. Amend. 4. *State v. Ochoa*, 112 Ariz. 582, 544 P.2d 1097 (1976).

[13] "We further note agreement with the court of appeals that the phrases probable cause and reasonable grounds to believe refer to the same standard of proof." *In Matter of Maricopa Juvenile Action*, 138 Ariz. 282, 284, 674 P.2d 836 (Az.S.Ct. en Banc 1983); Also See: *In Matter of Maricopa Juvenile Action*, 138 Ariz. 305, 674 P.2d 859 (App. 1983) at footnote 3, Review Granted Sept. 13, 1983; ARS Sec. 28-1062/1561.

"God, by giving to men needs and making them dependent upon the resource of labor, has made the right of labor the property of all men, and that property is primary, the most sacred and the most imprescriptible of all." (Anne Robert Jacques Turgot 1727- 1781). Petitioner within the law has a right to labor where and for whom he chooses, to be gainfully employed, and the right to enjoy the fruits of his labor. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." (United States Constitution, Ninth Amendment). The Ninth Amendment guarantees the people all other fundamental and inalienable rights not specifically enumerated in the previous eight amendments including Petitioner's property right in his labor and liberty right to do so where he chooses. Petitioner **does not** choose to spend nano second of his time nor a quantum of energy supporting the corrupt police powers of respondent Town.

Respondents violated Petitioner's Thirteenth Amendment civil rights when illegally forcing him to appear for the purpose of supporting the police powers of the Town of Paradise Valley against his will. Upon being notified of a complaint in his mail Petitioner called the Paradise Valley Clerk's office; Petitioner was told he had to appear and identify the driver of the vehicle. Affidavit of McNeill pars. 1-6 (c), Appendix VIII). On (October 31, 1997) and in the same envelope Petitioner was served by certified mail with a summons to appear on a photo radar complaint and a **subpoena to testify for the State.** (Affidavit of McNeill pars. 8, Appendix VIII). Respondents admit Petitioner was subpoenaed to testify for the State. (Doc. 102 exh. I; doc. 129 pp. 114, 115, 116, 136, 137). The complaint states a defendant need not appear if said defendant identifies the guilty driver. (doc. 102 exh. E; doc 129 Exh. 1 to exh. A p. 104 option 4b). The custom in Paradise Valley is to issue photo radar complaints to registered owners including corporations which cannot be responsible for violating ARS Sec. 28-

701. Defendant corporations and other defendants are used to identify the guilty driver who is then issued a complaint. (See: footnote 5). In the same photo radar shoot resulting in Petitioner being issued a summons and photo radar complaint, corporations were ticketed eight (8)times. (Appendix IX). Respondent's agents/employees did not subpoena Petitioner to testify for the **State** because Petitioner was believed to be guilty; respondent subpoenaed Petitioner knowing he was not guilty for the purpose of forcing him to appear and identify the driver from the photograph and do so in court. It is the custom and practice of respondent to have its agents/employees force registered owners support the police powers of respondent Town without compensation and that is a violation of that citizens Thirteenth Amendment civil right which prohibits involuntary servitude.

PETITIONER WAS ENTITLED TO HAVE SUMMARY JUDGMENT ENTERED IN HIS FAVOR ON ISSUE OF INVALID COMPLAINT

> If it affirmatively appears, from the pleadings, admissions, depositions, and affidavits, if any, that there is no genuine issue as to any material fact upon which the outcome of litigation depends, the case is appropriate for disposition by summary judgment and it becomes the duty of the court to enter such judgment.

SMS Mfg. Co. V. U.S.-Mengel Plywoods, C.A. Okl. 219 f. Supp. 606 (1955).

Summary judgment is decided upon the record before the court at time motion is heard. Fed. R. Civ. P. 56(c); Also See: footnotes 9 and 10). As noted by the district court Petitioner objected to exh. D as not "verified" or "certified" by any court. Also exh. D was not a part of any court record. (Appendix II PP. 6, 7, 8). Petitioner also ob-

jected to exh. D as follows:

> Plaintiff further objects to **exhibit D** as follows: 1) the terms " being first duly sworn: and "affiant" used in the text and other information contained within the four corners of exhibit D, identifies D as an affidavit which is inadmissible as it is undated and not sworn to before a notary public, hearing officer, or any identified person and therefore does not lay the required foundation for a charge of perjury if false. See: *Eytinge v. Territory*, 12 Ariz. 131, 100 P.2d 443 (1909); *Madsen v. Western Mortgage Co.*, 143 Ariz. 614, 694 P.2d 1228 (Ariz. App. 1985)

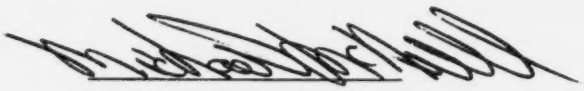
Doc. 105 PP. 2, 3.

On motion and cross motion for summary judgment at time motions were heard, there was no admissible evidence of a certifification for a valid complaint to issue as required by Arizona Statutes. Thus Petitioner was entitled to judgment in his favor as a matter of law as to the issue of Petitioner being summoned to appear on invalid complaint . Fed. R. Civ.P. 56(c) (Appendix II pp. 6, 7, 8) (Appendix VII); *SMS Mfg. Co. V. U.S.-Mengel Plywoods, Supra;People v. Harding, Supra; State Ex Rel Purcell v Superior Court, Supra;* ARS Sec. 28- 1062/1561; *State Ex Rel Purcell v Superior Court, Supra; Baumert v. Municipal Court for the City of Phoenix,Supra; Sweitzer v. Department of transportation, Motor Vehicle Division; Supra; Keller v. State, supra; Arizona constitution Art. III, IV;* doc. 102 exh. E; doc. 129, exh. 1 to exh. A, p. 103; Appendix II, doc. 127 p. 7 –14 through p. 8-25 ; doc. 129 exh A, to exh. 1). Giving Respondents numerous bites at the apple also denied Petitioner a fair trial

CONCLUSIONS:

This writ should be granted.

Respectfully Submitted this 30 day of June 2003



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Received December 14, 1999
CLERK OF DISTRICT COURT
DISTRICT OF ARIZONA
/s/ JH, Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MICHAEL MENEILL, Plaintiff vs. TOWN OF PARADISE VALLEY, An Arizona Town; ELSA LYNCH, A Paradise Valley Municipal Court Judge; MIKE COPPELA, A Paradise Valley Police Officer; JILL KENNEDY, Town Attorney for Paradise Valley; SHERWOOD JOHNSTON, III, Hearing Officer for Paradise Valley; Defendants.	No. CIV 99-0332 PHX RCB O R D E R

Plaintiff Michael McNeill brings this case pursuant to 42 U.S.C. § 1961. Currently before the court is Defendants' motion to dismiss for failure to state a claim. Having carefully considered the arguments of the parties, the court now rules.

I. BACKGROUND

The Town of Paradise Valley uses photo radar as one means to enforce its local traffic ordinances. When a

photo radar unit identifies a vehicle that is moving faster than the flow of traffic, the unit records the vehicle's speed and license plate and photographs the driver. The name of the vehicle owner is obtained from the Arizona Department of Motor Vehicles and a computer generated traffic ticket is mailed to the registered owner at the address appearing on the registration. The alleged violation is a civil traffic violation. See Ariz. Rev. Stat. § 28-121 (B) (1998). If the vehicle owner wishes to contest the alleged violation, he or she must appear in Muncipal Court of Paradise Valley and offer eveidence to rebut the allegation that he was the offending driver. Upon a determination that the offending driver is not the registered owner of the vehicle, the ticket is dismissed.

On approximately September 27, 1997, Plaintiff, as the registered owner of an allegedly speeding vehicle, received a computer-generated photo radar traffic ticket in the mail. Plaintiff moved to dismiss the citation because he claimed he was neither driving nor occupying the car at the time of the alleged violation. Subsequently, Plaintiff received a summons to appear in the Muncipal Court of Paradise Valley on February 23, 1998. To contest the ticket.

Plaintiff traveled from South Carolina to comply with the summons. Upon arriving at the courthouse, Plaintiff filed two motions to dismiss, one contesting the court's jurisdiction over photo radar tickets and the other claiming that Paradise Valley officials lacked probable cause to issue the citation. Plaintiff argued that the vehicle registration information on an allegedly speeding car is not sufficiently linked to the identity of the driver to justify issuing the owner a citation by mail. The court did not rule on either of Plaintiff's motion, but dismissed the case on motion from the Town Attorney.

On February 22, 1999, Plaintiff, proceeding pro se, commenced the instant action against Defendants

Sherwood Johnson, III, a hearing officer; Elsa Lynch, a muncipal court jusdge; Jill Kennedy, an attorney for Paradise Valley; Mike Coppela, a police officer; and the Town of Paradise Valley, Plaintiff named all individual defendants in their personal capacities. Defendants have moved to dismiss both Plaintiff's Complaint and Amended Complaint under Fed. R. Civ. P. 12(b) (6). Plaiantiff's motion for a temporary restraining order against Defendant Town of Paradise Valley to enjoin it from issuing photo radar complaints was denied by this court on July 25, 1999.

II. DISCUSSION

A. Scope of the Action

Defendats argue that the court should not entertain Plaintiff's Amended Complaint on the grounds that it would be an exercise in futility. Futility of amendment is a factor in determining the propriety of granting leave to amend. See Loehr v. Ventura County Community College Dist., 743 F. 2d 1310, 1319 (9th Cir. 1984). Here Plaintiff does not require leave to amend, as he is entitled to amend his Complaint "once as a matter of course at any time before a responsive pleading is served." Fed. R. Civ. P. 15(a). It is well established that a motion to dismiss does not constitute a response to a pleading. Therefore, Plaintiff's Amended Complaint was properly filed and now controls the action.

Plaintiff raised several claims against Defendants in his initial Complaint that he abandoned in his Amended Complaint, including obstruction of justice, violation of public policy, abuse of process, assault, conspiracy, invasion of privacy, negligence and "evil minds and outrageous conduct." An amendment to the complaint under Rule 15 (a) is the appropriate mechanism by which a plaiantiff may eliminate one or more claims among several from the original complaint. See Ethridge v. Harbor House Restaurant, 861 F.2d 1389, 1392 (9th Cir. 1988) (citing

Moore's Federal Pracitce. Because these causes of action were not renewed in the Amended Complaint, they will be deemed eliminated from the action.

B. Standard of Review

Under Rule 12 (b) (6), "dismissal for failure to state a claim is improper unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support which would entitle him to relief.'" Schowngerdt v. General Dynamics Corp., 823 F.2d 1328, 1332 (9th Cir. 1987) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). Thus, in undertaking its analysis, the court must limit its "review to the contents of the complaint, accepting the material factual allegations as true and construing them in
light most favorable to the {non-movant}." Id. Moreover, pro se complaints must be liverally construed, especially in civil rights cases. See Ferdik v. Bonzelet, F. 2d 1258, 1261 (9th Cir. 1992).

C. Plaintiff's § 1983 Claims

Plaintiff alleges that Defendats' use and administration of a photo radar triffic citation system biolated his civil rights as protected by the Fourth, Fifth, Eighth, Ninth, Thirteenth and Fourteenth Amendments of the Constitution.

Plaintiff alleges that he suffered a deprivation of his Fifth and Fourteenth Amendment rights when Defendant Johnston, in his role as a hearing officer for the Municipal Court of Paradise Valley, entered a plea of "not responsible" instead of a plea of "not guilty" on behalf of Plaintiff. Plaintiff claims that but for this erroneous entry he would not have had to appear at the February 23, 1998, hearing. The court finds that Defendant Johnston performed a "judge-like function" in entering a plea on behalf of Plaintiff. "Judges and those performing judge-like functions are absolutely free from liability for damages for acts performed in their official capacities." Ashelman v.

Pope, 793 F.2d 1072, 1075 (9th Cir. 1986) (en banc). Plaintiff has to recourse against Defendant Johnston because hearing officers are covered by judicial immunity. Plaintiff's § 1983 claim against Defendant Johnston will be dismissed.

Plaintiff further alleges that Defendant Lynch, the municiapl court judge who presided over the proceeding to challenge the citation, violated her constitutional rights in not allowing him to argue before the court. Plaintiff also claims that Defendant Lynch ordered police officers to escort him out of the courtroom, and subsequently, out of the courthouse when he requested a copy of the record from the clerk of the court after the proceedings.

The court finds that Defendant Lynch also stands under the cover of judicial immunity because she acted in her official capacity as a muncipal court judge. "Judicial immunity applies no matteer how 'erroneous the act may have been, and however injurious in its consequences it may have proved to plaintiff.'" Id. At 1075-76 (citing Cleavinger v. Saxner, 474 U.S. 193 (1985)). If Lynch's actions were improper -- which this court is unable to countenance even under a liberal reading of Plaintiff's Complaint -- she remains protected from suit. The court will dismiss Plaintiff's § 1983 claims against Defendant Lynch, as she was well within the purview of her official capacity as a municipal court judge.[1]

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[1] Plaintiff argues that judicial immunity does not apply in the clear absence of jurisdiction and avers that deficiencies in the traffic Complaint precluded Defendants from gaining jurisdiction over his action. However, the applicable test for determining when a defendant is denied judicial immunity is the "clear absence of all jurisdiction." stump v. sparkman, 435 U.s. 349, 357 (1978) (emphasis added). "(T)he necessary inquiry in determining whether a defendant judge is immune from suit is whether at the time he took the challenged action he had jurisdiction over the subject matter before him." Id. At 356. Municipal courts have .

Plaintiff argues that Defendant Kennedy, the Paradise Valley Town Attorney, violated his constitutional rights by subpoening Plaintiff to testify although no probably cause existed for the issuance of the traffic citation. Plaintiff further argues that compelling him to appear for the purpose of identifying the speeding driver constitutes involuntary servitude in violation of the Thirteenth Amendment. Plaintiff's claim is unavailing, for "[p]rosecutors are also entitled to absolute immunity from section 1983 claims" when acting in their prosecutorial role. Id. At 1075 (citing Imbler v. Pactman. 424 U.S. 409, 427 (1976)). Kennedy's actions were clearly within the scope of Her prosecutorial role for which she is entitled to absolute

Her prosecutorial role for which she is entitled to absolute immunity. Therefore, Plaintiff's § 1983 claim against Defendant Kennedy will be dismissed.

Plaintiff alleges that Defendant Coppela, a Paradise Valley police officer, violated his Fourth Amendment rights actions constitute "assault" and "illegal seizure." Although the court will not "necessaraily assume the truth of legal conclusions merely because they are cast in the form of factual allegations," the court must consider all material allegations as true in ruling on a motion to dismiss. Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). Defendants argue that Plaintiff merely alleges legal conclusions regarding the actions of Defendant Coppela and assert that qualified immunity shields the officer from these allegations.

"[G]overnmental officials performing discretionary function[s] generally are shielded from liability for civil

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concurrent jurisdiction over various traffic violations, including speed restrictions. See Ariz. Rev. Sts. § 28-1552 (1998). As officers of a municipal court designated by statute to adjudicate traffic claims, both Defendants Johnson and Lunch had subject matter jurisdiction over Plaintiff's speeding citation

damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In adjudicating a motion to dismiss a § 1983 claim brought against an official performing a discretionary function, the court must determine whether the plaintiff stated that the official violated a constitutional or federal statutory right, see Siegert v. Gilley, 500 U.S. 226, 232 (1991), and whether the right was clearly established, see Anderson v. Creighton, 483 U.S. 635, 640 (1987). "The contours of [a clearly esablished] right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id.

Plaintiff indicates that Defendant Coppela violated his Fourth Amendment rights. Although Plaintiff uses legally conclusive assertions, as opposed to factual allegations, to describe Defendant Coppela's conduct, the terms used by Plaintiff suggest factual allegations that the officer used improper physical contact in escorting Plaintiff from the courtroom and courthouse. Moreover, the contours of the right to be free from improper custodial force under the Fourth Amendment are clearly established. Having found Plaintiff's legal assertions suggestive of a potential claim, and in light of his pro se status, the court will grant Plaintiff leave to amend to state specific factual allegations concerning Defendant Coppela's conduct.

In addition to the suggestion of an assault claim, Plaintiff alleges that Defendant Coppela violated Arizona statutory law by certifying the traffic complaint without probably cause that Plaintiff was the photographed driver. Generally, complaints commencing proceedings for municipal violations shall be made under oath. See Ariz. Rev. Stat. § 22-421 (A) (1990 & Supp. 1998). However, traffic

complaints need not be sworn to if the issuing officer certifies that he or she has "reasonable grounds to believe and do[es] believe that the person named [in the complaint] committed the offense or civil violation...." Ariz. Rev. Stat. § 28-1561 (A) (1998). Falsely certifying a traffic complaint constitutes perjury. See Ariz. Rev. Stat. § 28-1561 (B) (1998).

Plaintiff asserts that the nexus between a speeding driver and a registered vehicle owner is questionable and claims that the traffic citation issued to him was not properly certified. The notion of obtaining probable cause before issuing warrants and arrests is clearly defined, and the statutory provision regarding the issuance of civil traffic complaints is equally clear. Being issued a civil complaint without proper certification may constitute a violation of a clearly esablished Fourth Amendment right. But again, Plaintiff has not alleged the requisite factual basis of the claim. It is unclear whether Plaintiff alleges that Defendant Coppela's specific conduct forms the basis of the violation, or conversely, whether he challenges the alleged Town policy of issuing improper certified traffic citations. If Plaintiff seeks only to challenge the overall policy of issuing allegedly improperly certified traffic complaints, he will challenge Defendant Coppela's official capacity, and only Defendant Town will ultimately bear the burden of the claim. See Hafer v. Melo, 502 U.S. 21, 25 (1991) (finding that official capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent.") Accordingly, the court will grant Plaintiff leave to amend to allege the factual basis of this claim.

Plaintiff alleges that Paradise Valley's use of photo radar is unconstitutional because traffic complaints issue without probable cause to believe that the speeder is the registered owner of the vehicle. Municipalities face liability under § 1983 only when the allegedly violative action is taken pursuant to an official policy or custom. See Monell v.

Department of Soc. Serv. Of New York, 436 U.S. 658, 690-91 (1978).

Plaintiff apparently argues that Defendant Town's policy or custom of issuing traffic citations to vehicle owners without investigating if the owner was in fact the photographed driver vio ates his constitutional rights. Probable cause to issue a traffic citation exists when "the agents know reasonably trustworthy information sufficient to warrant a prudent person in believing that the accused had committed or was committing an offense." Easyriders Freedom F.I.G.H.T. v. Hannigan, 92 F.3d 1486, 1498 (9th Cir. 1996) (citations ommitted). "Mere suspicion, common rumor, or even *strong reason to suspect* are not enough, however." Id. (emphasis added) (citations ommitted). Here, the liscense plate photographed by the photo radar unit is traced through vehicle registration and driving records to produce the citation against the owner of the vehicle, but it does not appear that Defendant Town's policy or custom requires any further investigation into whether the photographed driver was the vehicle owner before issuing the citation. The court finds the nexus between the vehicle owner and the alleged speeder closer to "a strong suspicion to suspect," rather than reasonable trustworthy information that the speeder was the owner. The court finds Plaintiff has stated a claim against Defendant Town.

In sum, the absolute judicial or prosecutotorial immunity of Defendant's Johnston, Lynch and Kennedy preclude all Plaintiff's § 1983 claims. Plaintifff, however, may be able to establish a § 1983 claim that pierces Defendant Coppela's qualified immunity if he properly alleges the factual basis for his assault and certification claims. The court will grant Plaintiff leave to amend for these purposes. Finally, the material allegations asserted against Defendant Town constitute enough of a challenge to Defendant Town's official policy or custom as to form a

potentially viable claim. After amending, any official-capacity claim against Defendant Coppela will be considered dismissed, as Plaintiff has already asserted a § 1983 claim against Defendant Town.

D. Plaintiff's RICO Claims

Plaintiff asserts that Defendatns have engaged in a pattern of racketeering activity and in a conspiracy to engage in such a pattern in violation of RICO. See 18 U.S. C. § 1962 (c) - (d) (1984 & Supp. 1999). The sole civil action allowable under RICO is intended to remedy an "injur[y] in [claimant's] business or property." Id. At § 1964 (c). Plaintiff alleges that "Defendants obtained Plaintiff's property and caused Plaintiff to suffer extreme monetary losses." (Am. Compl. At 9.)

The traffic citation against Plaintiff was dismissed and the potential civil fine thus constitutes no loss to property. Inasmuch as Plaintiff's complaint can be construed to shape the expenses incurred from his trip from South Carolina into property injury, his claim is barred by Defendants' immunities. Individuals having absolute immunity cannot be sued under RICO. See Cahappell v. Robbins, 73 F3d 918, 922 (9th Cir. 1996) (holding that absolute legislative immunity protected legislators from suits under RICO claims). Thus, just as the absolute immunity of these various individual defendants barred Plaintiff from pursuing claims against them under § 1983, similarly their absolute immunity shields them from suit under RICO as wewll. Accordingly, the RICO claims against Defendants Johnston, Lynch and Kennedy must be dismissed.

Qualified immunity also provides a shield to RICO claims if the accused official did not know that his action violated " 'clearly established' rights conferred on the plaintiffs by the RICO statute." Culligan, 128 F.3d at 312 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). The

court finds no "clearly established" rights exist with regard to issuance of photo-radar traffic citations through RICO. As a result, qualified immunity shields Defendant Coppela and the RICO claims against him will be dismissed.

Plaintiff apparently sets forth a civil RICO claim, based upon the predicate act of mail fraud, against Defendant Town. In adjudicating a civil RICO claim based on the predicate act of mail fraud, the Ninth Circuit found that "governmental entities are incapable of forming [the] malicious intent" necessary to support a RICO action. See Lancaster Community Hosp. F. Antelope Valley Hosp., 940 F.2d 397, 404 (9th Cir. 1991); see also Pedrina v. Chun, 97 F.3d 1296, 1300 (9th Cir. 1996) (dismissing civil RICO claim based upon the predicate aacts of bribery, robbery and extortion against a city by citing the Lancaster precedent).

Thus, the court does not find merit to Plaintiff's RICO claims against any individual defendant or against Defendant Town.

IV. Rull 11 Sanctions

Both parties have alleged Rule 11 violations against the other See Fed. R. Civ. P. 11 "Rule 11 provides for the imposition of sanctions when a [pleading or] motion is frivolous, leggally unreasonable, or without factual foundation, or is brough for an improper purpose." Warren v. Guelker, 29 F.3d 1386, 1388 (9th Cir. 1994) (citations ommitted). The court finds the Defendants' motions to dismiss proper and mertorious overall. Thus, Plaintiff's motion for Rule 11 sanctions is not justified.

With respect to the defendants' motion to sanction Plaintiff, while Rule 11 applies to pro se plaintiffs, the Rule is applied less rigorously to parties representing themselves than to lawyers. "[T]he court must also take into account a plaintiff's pro se status when it determines whether the filing was reasonable." Id. At 1390 (citations ommitted). See also Hughes v. Rowe, 449 U.S. 5, 15 (1980) (per curiam).

("An unrepresented litigant should not be punished for his failure to recognize subtle factual or legal deficiencies in his claim."); Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam) (pro se complaint alleging civil rights violations held to "less stringent standards than formal pleadings drafted by lawyers"); Wood v. McEwen, 644 F.2d 797, 802 (9th Cir. 1981) (while awarding costs and attorney's fees under Fed. R. App. P. 38, Court of Appeals expresses particular reluctance to impose penalties on litigant appearing pro se).

The court finds that, although some of Plaintiff's claims cannot withstand the motion to dismiss, he did not violate Rule 11 (b). It appears that Plaintiff filed suit against Defendants only after inquiring into the relevant law surrounding the photo radar system. While some of Plaintiff's legal conclusions are unsupported or defeated by Defendants' claims of immunity, they are not frivolous or legally unreasonable. Nor does it appear that Plaintiff's purpose in filing the suit was improper (e.g., to harass). Rule 11 sanctions would be inappropriate here, especially considering Plaintiff's pro so status.

IT IS ORDERED granting Defendants' motion to dismiss all Plaintiff's claims not renewed in his Amended Complaint (I.e., obstruction of justice violation of public policy, abuse of process, assault, conspiracy, invasion of privacy, negligence and "evil minds and outrageous conduct") (docs. 7 and 38).

IT IS FURTHER ORDERED granting Defendants' motion to dismiss as to Defendants Johnston, Lynch and Kennedy due to their absolute immunity (docs. 7 and 38).

IT IS FURTHER ORDERED denying Defendants' motion to dismiss as to defendant Coppela, if Plaintiff properly amends to state the factual basis of the claims against the officer (docs. 7 and 38).

IT IS FURTHER ORDERED granting Plaintiff leave

to amend his Complaints to state the factual basis of his claims against Defendant Coppela, provided that it is filed within 20 days of filing this Order.

IT IS FURTHER ORDERED denying Defendants' motion to dismiss as to Defendant Town (docs. 7 and 38).

IT IS FURTHER ORDERED denying Plaintiff's and Defendants' votions for Rule 11 sanctions (docs. 41 and 42).

DATED this 7th day of December, 1999.

/s/ Robert C. Broomfield
United States District Judge

Copies to pro se plaintiff and counsel of record

Received April 9, 2001
/s/ JH
CLERK OF DISTRICT COURT
DISTRICT OF ARIZONA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MICHAEL MCNEILL) plaintiff,) vs.)) TOWN OF PARADISE) VALLEY, et al.,)) defendants.)	No. CIV 99-332-PHX-RCB O R D E R

Plaintiff McNeill filed a complaint in February 1999, raising a number of claims against a number of defendants. By order of December 13, 1999, the court dismissed the bulk of McNeill's complaint. Order (doc. #45). The only issue remaining is McNeill's claim that the Town of Paradise Valley (the Town) violated his civil rights by issuing him a civil traffic citation. The citation is said to have been issued on the certification of a police officer using a photo radar device. The Town moved for summary judgment and McNeill cross-moved. The court heard oral argument on March 12, 2001, at which time it took the matter under ad-visement.

Having carefully considered the parties' briefs and the evidence presented, the court now rules.

BACKGROUND

As described in the court's order of December 14,

1999, the Town uses photo radar to enforce its local speed ordinances. When a photo radar unit identifies a vehicle that is moving faster than the flow of traffic, the unit records the vehicle's speed and license plate and photographs the driver. The name of the vehicle owner is obtained from the Arizona Department of Motor Vehicles based on license plate records. The officer operating the photo radar unit certifies that he or she has reasonable grounds to believe that the persons who are to be issued tickets are the persons caught speeding. Def. SOF Ex. D (Coppola Dec l.). A computer generates a traffic ticket that refers to the officer's certification and the registration information. A traffic ticket is then mailed to the registered owner at the address appearing on the registration. See Def. SOF Ex. A (Warner Aff.) ¶ 3.

A traffic ticket and complaint was mailed to McNeill on August 26, 1997, asserting that on August 19, 1997, he drove his 1985 Ford 150 pick-up truck at a speed of 53 miles an hour in a 40 mile-an-hour zone. Def. SOF, Ex. E. The ticket represents that Officer Mike Coppola certified that he had "reasonable grounds" for believing that McNeill was the driver. McNeill did not personally receive the ticket, for in early September 1997, McNeill began working at a nuclear power plant in South Carolina. His daughter, apparently still resided in Arizona, called to inform McNeill of the traffic ticket and complaint. McNeill states that he called the municipal court and was told he would have to appear to enter a plea and that if he did not accept responsibility himself, he would have to identify the driver of the cited vehicle.

The undisputed evidence shows that McNeill then received a copy of the summons and complaint by certified mail on or about October 31, 1997. Notwithstanding the wording on the complaint explaining four ways of responding to the ticket, McNeill understood that he was re-

quired to appear in the Municipal Court in Paradise Valley, or else his driver's license would be suspended. McNeill Aff. ¶¶ 6, 17.

As a nuclear power worker, McNeill asserts that he is held to especially high standards of conduct, and he was concerned that if he were arrested, fined, or had his license suspended, his career would be destroyed. McNeill states that he resigned from his job in south Carolina and traveled to Arizona to appear for the hearing on the traffic citation. He alleges that he received documents from the Town indicating that the hearing was actually what he contends was an arraignment, but he fails to include the documents. [1] At this hearing, the traffic citation was dismissed.

McNeill's contention here is that his constitutional rights were violated when the Town issued him a civil citation on the basis of photo radar. While McNeill persists in asserting claims arising from the hearing in the Paradise Valley Municipal Court, this court has dismissed these claims, and McNeill has not taken the opportunity to amend his complaint or to file a motion for reconsideration. The court shall address only those claims not dismissed by the Order of December 14, 1997.

The court refers to McNeill's First Amended Complaint, filed June 23, 1999 (doc. #28), to identify these claims. [2] The caption and the prayer indicate that the law-

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[1] According to Fed. R. Civ. P. 56, the court may consider only admissible evidence when reviewing a motion for summary judgment. Under the Federal Rules of Evidence, mcNeill may not testify about the contents of documents; rather, he must produce the documents themselves. Because Mcneill's testimony about the effect of the documents is not admissible, the court cannot credit his allegations for purposes of this ruling.

[2] The docket indicates that one amended complaint was filed June 21, 1999 and another was filed June 23, 1999. They are the same document, but the court shall use the amended complaint last received by the clerk

suit is brought pursuant to 42 U.S.C. § 1983. The body of the complaint asserts that the Town's photo radar policy violated McNeill's fourth, Fifth and Fourteenth Amendment rights. Am. Compl. ¶ 18. McNeill also contends that when the Town required him to Compl. ¶ 18. McNeill also contends that when the Town required him to appear to contest the ticket, it violated his Thirteenth Amendment rights. Id. ¶ 25. He argues that the Town violated his right to personal autonomy as well. Id. · 26. McNeill states that his Eighth and Ninth Amendment rights were violated, but he does not link these violations to any specific action by the Town; the court believes he refers to the expense he incurred in traveling to Paradise Valley from South Carolina.

DISCUSSION

In determining whether to grant summary judgment, the court will view the facts and inferences from these facts in the light most favorable to the nonmoving party. Matsushita Elec. Co. v. Zenith Radio Corp., 475 U.S. 574, 577 (1986). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment, the requirement is that there be no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). A material fact is any factual dispute that might affect the outcome of the case under the governing substantive law. Id. At 248. A party opposing a motion for summary judgment cannot rest upon mere allegations or denials in the pleadings or papers, but instead must set forth specific facts demonstrating a genuine issue for trial. See id at 250. Finally, if the nonmoving party's evidence is merely colorable or is not significantly probative, a court may grant summary judgment. See, e.g., California Architectural Build. Prods., Inc. v. Franciscian Ceramics, 818 F. 2d 1466, 1468 (9th Cir. 1987). Only admissible, properly

authenticated evidence may be considered on a Rule 56 motion. Canada v. Blain's Helicopters, 831 F. 2d 920, 925 (9th Cir. 1987).

Two preliminary matters must be addressed before the court reaches the summary judgment analysis. First, McNeill has filed a motion to compel. Second, he has objected to all of the Town's exhibits on one theory or another.

I. Preliminary Evidentiary Issues

A. Motion to Compel

On February 20, 2001, more than a month after he filed his response to the Town's motion for summary judgment, McNeill moved to compel complete responses to his second interrogatory. McNeill demanded verified answers, which he claims in his motion that the Town did not provide. Substantively, McNeill's interrogatory asked the Town to identify several persons who had some kind of role in the hearing in the Municipal Court. He also asked for the name of any police officer or other person who caused any photo radar traffic ticket complaint to be issued. McNeill asked for their work and residential addresses and their professional insurers, if any. He also asked the Town to identify other persons present at the Municipal Court during his hearing.

The Town identified the title of the persons expressly named by McNeill, but objected to releasing their residential addresses. It also identified its insurer. McNeill has redacted a portion of the Town's response without explaining the grounds for this elision. See Motion to Compel (doc. #), Ex. 3.

In opposing the Motion to Compel, the Town states that McNeill failed to comply with Local Rule 1.10 (j), which requires parties to consult prior to filing discover motions. The Town states that it is in in the process of having the interrogatory responses verified, that

residential addresses of its personnel are covered by a qualified privilege, and that it has made a good faith and reasonable effort to identify other persons in the courtroom at the time of the hearing. It insists that having to produce the traffic tickets of every defendant appearing before the Municipal court the same day as McNeill is overly burdensome and unlikely to lead to admissible evidence.

McNeill did not renew his complaint about the unverified interrogatory responses at the hearing. The court is not sure whether this remains a live issue, in light of the Town's representation that it would cure the verification problem. Assuming that McNeill still anticipates a ruling, his motion is denied. Failure to observe the consultation requirement set out in Local Rule 1.10 (j) is grounds for denying the motion without prejudice. Moreover, it is abundantly clear that McNeill's interrogatory request will not lead to evidence admissible on the issue in this court. The court reiterates that it has dismissed McNeill's claims arising from his experience at the municipal court hearing. Accordingly, McNeill has shown no need for the residential addresses of the Town personnel present at that hearing, no need for the tickets of other defendants present that day, and no need to ascertain the identify of other persons present. The motion to compel is denied.

B. Evidentiary Objections

McNeill objects that Defendant's exhibits D, E, G, H, J, K, L, M and N, have not been "verified" or "certified by any court." Most of these objections may be dealt with summarily. Exhibit E, a copy of the ticket issued to McNeill, speaks for itself. Exhibits G. H, K, L, M, and N are pleadings and orders issued in the municipal court proceedings and they are irrelevant. Exhbit J is a copy of a certified mail receipt McNeill signed to receive a subpoena to appear in Paradise Valley on the trial date of December 18, 1997. It is

also irrelevant. McNeill's objections to exhibits E, G, H, J, K, L, M and N are overruled as moot.

Exhibit D is a different story. This document purports to be Officer Coppola's certification that he had reasonable grounds to believe McNeill was speeding, which is signed but not dated. There is no affidavit testimony explaining where the document came from. Nor does the certification suggest any link to McNeill's truck. Although the document has lines for notarization, it was never notarized. In pertinent part, Coppola's certification reads:

> On August 19, 1997, I parked the speed Camera unit and, using correct procedures, operated the speed Camera unit to monitor traffic.
>
> I certify that upon reasonable grounds I believe that each of the defendants complained against on this date upon the basis of the Speed Camera committed the act described contrary to law and I have caused a copy of the complaint to be served on each defendant.

Def. Ex. D.

In response, the Town "defends its reliance" on this document (and the other exhibits):

> based on the fact that these are all certified documents that were contained in the court's File of the Town of Paradise Valley; these documents were certified by the Court Services Supervisor and were disclosed to Plaintiff in August 2000.

DSSOF (doc. #112). The Town submits a letter from the Court Services Supervisor, certifying that "the attached 81 pages are a true copy of all records for case number 223473A." DSSOF, Ex. B (Rasmussen letter of August 16, 2000). Unfortunately, the letter was detached from the 81 pages it once accompanied. Therefore, the court ordered Defendant to produce the 81-page file certified by the Court Services supervisor so that the court could confirm the

provenance of Exhibit D. Order of March 13, 2001.

Defendant complied on March 15, 2001. Exhibit D is not among the 81-page file. In order for the certification to support issuance of a ticket to McNeill, the Town must establish that the certification was made in reference to McNeill's truck and kept in a way to maintain the connection between Coppola's radar gun reading and McNeill's truck. Without authentication, Exhibit D cannot be admitted as evidence of Officer Coppola's certification. For the purpose of the pending motions, McNeill's objections to Exhibit D is granted. [3]

McNeill also objects that exhibits a, B. C, F and I are irrelevant. McNeill does not analyze the documents to establish his point of view. Defendants have discussed the relevance of each document. See DSSOF at 2. The court has examined the exhibits and agrees with Defendant that the challenged exhibits are at least somewhat relevant. McNeill's objections to exhibits A, B, C, F and I are denied.

II. Constitutional Claims

Defendant has repeatedly characterized McNeill's claim against it as a Section 1983 claim. See, e.g., Motion for summary Judgment (doc. #101) at 3. In its dispositive motion, the Town defends its photo radar practice on the merits. McNeill's cross-motion asserts that Fifth, Eighth, Ninth and fourteenth Amendment claims accrued as a result of

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[3] McNeill also argues that a certification does not provide a sufficient basis for issuing a ticket because the certifying officer cannot be held accountable for perjury. This argument would have merit but for an Arizona statute. Arizona law describes that certification is sufficient to issue a ticket, A.R.S. § 28-1561 (A), and that a false certification exposes an officer to liability for perjury, A.R.S. § 28-1561 (B). Therefore, the certification subjects the officer to perjury prosecution, even though its face does not indicate that it is sworn testimony. His objection to Exhibit D on these grounds is denied.

of how the Town treated him. In response, the Town contends that these claims are based on specific acts of individual Town employees and do not reflect a policy or custom. It argues that as a municipality, it cannot be held liable on these claims. Response at 5. At oral argument, this contention was reasserted.

A. Fourth Amendment

In moving for summary judgment, the Town contends that its photo radar citations for civil traffic violations are issued on legally sufficient grounds. The parties dispute what standard of police justification should govern photo radar citations. McNeill contends that officers must develop "probably cause' to believe that speeding drivers are the registered owners of the vehicles they occupy. The Town urges a lesser standard. The parties also dispute whether the photo radar system generates enough information to justify a citation. The court shall first outline the requirements of the fourth Amendment before discussing the sufficiency of the evidence presented here.

Whether a law enforcement officer has sufficient grounds for stopping someone depends on the nature of the intrusion, for the law recognizes a distinction between arrests and other police stops. In order to effect an arrest, the federal Constitution requires law enforcement officers to establish "probable cause" to believe that the suspect has committed or is about to commit an offense. See, e.g., Michigan v. DeFillippo, 443 U.S. 31, 99 S. Ct. 2627 (1979). Intrusions that are less invasive than arrests, by contrast, are justifiable on the basis of "reasonable suspicion." See Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968); Brown v. Texas, 443 U.S. 47, 99 S. Ct. 2637 (1979). The standard for m making a traffic stop is an "articulable and reasonable Suspicion." Delaware v. Prouse, 440 U.S. 648, 663, 99 S. Ct. 1391, 1401 (1979); United States v. Lopez-Soto, 205 F. 3d

1101, 1104-05 (9th Cir. 2000).[4] The reasonableness of a seizure less intrusive than an arrest depends on the balance between the public interest and the individual's right to freedom from arbitrary interference by law enforcement officers. Dunaway v. New York, 442 U.S. 200, 209 99 S. Ct. 2238, 2255 (1979). Consideration of the constitutionality of such seizures involves a weighting of the gravity of the public concerns, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty. Brown, 443 U.s. at 51, 99 S. Ct. at 2640; Rise v. State of Oregon, 59 F. 3d 1556, 1560 (9th Cir. 1995). In order for a traffic stop to be the basis for liability under section 1983, it must be unreasonable under the circumstances. Brower v. County of Inyo, 489 U.S. 593, 109 S. Ct. 1378 (1989).

The Fourth Amendment protections against unreasonable searches and seizures fully apply in civil contexts. See Soldal v. Cook county, Ill., 506 U.s. 56, 67 n. 11, 113 S. Ct. 538, 546 n. 11 (1992). The town does not seriously dispute that its civil traffic citations must conform to fourth Amendment requirements. [5] It maintains that the standard for traffic stops, not arrests, should apply, because the

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[4] Some uncertainty about the traffic stop standard has been injected by a remark of the supreme court, which recently stated that "(a)s a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." Whren v. United States, 517 U.S. 806, 810, 116 S. Ct. 1769 (1996). Whren could be read to require traffic stops to meet the "probable cause" standard, where previously "reasonable suspicion" sufficed. The

[5] At oral argument, counsel for the Town suggested for the first time that photo radar citations do not rise to the level of intrusions, and therefore do not meet the threshold forfourth Amendment analysis. The Town offered no legal justification for this theory and the court finds it untimely. It shall not be explored further in connection with these motions.

mailed citations do not involve physical restraint of the cited driver, nor is the driver subject to police custody

The Town relies on a variety of sources of state law for the proposition that issuance of a civil traffic citation in Arizona is not an arrest and therefore not subject to "probable cause" analysis.[6] The Ninth Circuit has deferred to a state's characterization of traffic citations in determining the standard of police suspicion to support issuing a citation. See Easyriders Freedom F.I.G.H.T. v. Hanningan, 92 F. 2d 1486, 1498 (9th Cir. 1996). A state cannot authorize standards lower than the constitutional floor, however. See Knowles v. Iowa, 525 U.S. 113, 119 S. Ct. 484 (1998). Accordingly, the terms used by the state statutes and approved by state courts are informative but are not dispositive of the constitutional issue.

The court is aware of no federal case law deciding whether issuance of a civil traffic citation effects an arrest. Arguably, issuing a citation has wider repercussions than a mere investigatory traffic stop. Nevertheless, for the reason that follows, the court concludes that the traffic stop "reasonable suspicion" standard and not the arrest

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Ninth Circuit has held that Whren does not effect a change in previously settled law. Lopez-Soto, 205 F. 3d at 1104. Accordingly, Ninth Circuit decisions continue to assess whether reasonable suspicion has been established. See, e.g., United States v. Rojas-Millan, 234 F. 3d 464, 468 suspicion." Delaware v. Prouse, 440 U.S. 648, 663, 99 S. Ct. 1391, 1401 (1979); United States v. Lopez-Soto, 205 F. 3d (9th Cir. 2000); United States v. Twilley, 222 F. 3d 1092, 1095 (9th cir. 2000).

[6] A statute provides that to make an arrest, the person to be arrested must be actually restrained or submit to the custody of the person making an arrest. A.r.s. § 13-3881 (a). The Arizona Court of Appeals has held that an officer need only have reasonable suspicion to issue a civil citation for traffic violations. State v. Boudette, 791 P. 2d 1063, 1067-68 (Ariz. App. 1990); see also State v. Ossana, 2001 WL 197936, *2 (Ariz. App. 2001); (officer may stop car to issue a civil citation if he has a reasonable belief that a traffic violation has occurred).

"Probably cause" standard applies to photo radar citations
The Supreme Court has held that in order to stop a driver, a law enforcement officer must have a reasonable suspicion "that a traffic violation has occurred. Whren v. United States, 517 U.S. 806, 818, 116 S. Ct. 1969, 1776 (1996). Stopping drivers arbitrarily and without the premise of a specific traffic enforcement rationale violates of the Fourth Amendment. See Prouse, 440 U.S. at 663, 99 S. Ct. at 1401. Thus, each traffic stop must be based on the belief that a citable violation has occurred, and traffic stops need only be premised on "reasonable suspicion" that the violation has occurred. The court finds no plausible grounds for holding that an officer must have "reasonable suspicion" to pull a driver over but must have "probably cause" to actually issue a citation. Accordingly, the court rejects McNeill's theory that the State must have "probably cause" to send photo radar citations and adopts "reasonable suspicion" as the appropriate criterion.

The next question is whether the State's practice of matching the license plate of speeding vehicles with registration information is enough to establish "reasonable suspicion" that the speeding motorist is the registered owner. Paradise Valley has established a rebuttable presumption that the registered owner of a vehicle is its driver. See Paradise Valley Town code § 11-2-18(a). Given the civil nature of the challenged citation, such a measure is permissible. See City of Portland v. Kirk, 518 P. 2d 665 (1974) (approving a rebuttable presumption that registered owner of vehicle is the person who parked the vehicle); see also City of Seattle v. Stone, 410 P. 2d 583, 585 (Wash. 1966) (approving a rebuttable presumption that the registered owner of a vehicle is responsible for parking it illegally). The Ninth Circuit has recently approved a rebuttable pre
sumption that the person who owns property controls it, and authorized civil penalties to flow from an unrebutted

presumption. See Rucker v. Davis, 327 F. 3d 1113, 1127 (9th Cir. 2001) (en banc) (approving a rebuttable presumption that a tenant controls activities within his apartment, and, if the presumption is not rebutted, may be evicted for allowing unlawful activities). Thus, in theory, the Town's photo radar citation system comports with constitutional standards.

Alternatively, to the extent that photo radar citations should be viewed as more similar to highway checkpoints than traffic stops, analysis under the standard set forth in Brown v. Texas, 443 U.S. 47, 99 S. Ct. 2627 (1979), yields the same result. To determine the constitutionality of such intrusions, the court balances the public interest of the intrusion against the infringement of individuals' privacy interests. The public interest in highway safety is a strong one. See Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 451, 110 S. Ct. 2481, 2485 (1990) (recognizing public interest in curtailing traffic injuries). The State has submitted statistics of the number of accidents each year in Paradise Valley for the years 1987-1999. DSOF, Ex. B. The statistics reflect a trend toward decreasing number of accidents since photo radar was introduced in 1987. Accordingly, there is a legitimate basis for the Town's belief that deploying photo radar furthers the public welfare.

By comparison, the intrusion on individual drivers is minimal. First, the roads are public spaces and being viewed while about on them does not implicate individual privacy interests. See G. M. Leasing Corp. v. United States, 429 U.S. 338, 97 S. Ct. 619 (1977). Second, drivers are not detained, even momentarily. Photo radar has the virtue of sparing drivers the inconvenience and embarrassment of the siren-flashing-lights drama of a standard traffic stop. Third, the court notes that only speeding drivers have cause for concern, for only they are seized by the issuance of a citation, and only after an individualized basis has

been established by the radar and photograph. Cf. City of Indianapolis v. Edmond, 121 s. Ct. 447, 455 (2000) (rejecting checkpoint to determine illegal activity without individualized suspicion). In Sitz, the Supreme Court addressed the "subjective intrusion" of a traffic enforcement method that subjected every driver to a brief delay. 496 U.S. at 4521, 110 S. Ct. at 2486. "The 'fear and surprise' to be considered are not the natural fear of one who has been drinking over the prospect of being stopped at a sobriety checkpoint but, rather, the fear and surprise engendered in law-abiding motorists by the nature of the stop." Id. Drivers in compliance with the Town's speed limit have no grounds for apprehension when they pass through a photo-radar enforcement zone. Fourth, the burden on a car owner who receives a civil speeding citation when s/he was not the driver is slight. Car owners who receive tickets when relatives, friends, permittees or subsequent owners of the vehicle trip the photo radar device can avoid the citation by responding through the mail. The court concludes as a theoretical matter, that the photo radar citation system employed by the Town does not violate the Fourth Amendment rights of motorists.

In this case, the speeding truck was registered in McNeill's name. He has not disputed his ownership, or that the truck was speeding. While he argues that the citation was not signed by the issuing officer, this fact is of no importance. A signed certification backs up the computer-printed citation. Because the court excluded Defendant's Exhibit D, however, there is no evidence of a certification to support McNeill's citation. Whether McNeill's traffic citation was issued on the basis of a legally sufficient certification remains disputed, and it is undoubtedly material. Therefore, the court denies the cross-motions for summary judgment on this claim.

B. Fourteenth Amendment

McNeill argues that the Town's photo radar system violates the Equal Protection Clause of the fourteenth Amendment, "for in Paradise Valley a citizen may be sum moned to appear on a Photo Radar complaint with hone of the protections afforded other motorist(s) inside and outside the town limits by the Arizona Legislature in Title 28, Chapter 3, § 10621" Cross-Motion at 6. In response, the Town contends that all motorists passing through Paradise Valley are treated the same under the photo radar enforcement policies, and that its decision to implement photo radar satisfies rationale basis scrutiny.

Where a government distinction is challenged, and it does not burden a fundamental right or target a suspect class, it will be upheld "so long as it bears a rationale relation to some legitimate end." Vacco v. Quill, 521 U.S. 793, 799, 117 S. Ct. 2293 2297 (1998) (quoting Romer v. Evans, 517 U.s. 620, 631, 116 S. Ct. 1620, 1627 (1996)). The town assumes that no fundamental right is burdened.

The Supreme court has recognized a fundamental right to interstate travel, see Attorney General of New York v. Soto-Lopez, 476 U.S. 898, 903, 106 S. Ct. 2317 (1986), and a fundamental right to free movement, see Nunez by Nunez v. City of San Diego, 114 F. 3d 935, 944 (9th Cir. 1997) (citing Papachristou v. City of Jacksonville, 405 U.s. 156, 164, 92 S. Ct. 839, 844 (1972)). There is, however no fundamental right to drive a motor vehicle on public roads. Miller v. Reed, 176 F. 3d 1202, 1206 (9th Cir. 1999). The fundamental right to travel is not burdened by restrictions on a particular mode of transportation. Id. In this case, the court rejects any suggestion that photo radar burdens a fundamental travel right, for there is not evidence that motorists' ability to travel is burdened by a speed limit. cf. Nunez by Nunez, 114 F. 3d at 944 (finding that city's juvenile curfew ordinance unconstitutionally burdened minors' fundamental right to movement).

As far as the rationality of the Town's law enforcement choice is concerned, photo radar is correlated with decreasing traffic accidents, and the City Council could rationally attribute this salutary development to the use of photo radar. McNeill cannot prevail on his equal protection theory. The Town's motion for summary judgment on this claim is granted.

C. Thirteenth Amendment

In his cross-motion, McNeill contends that his Thirteenth Amendment rights were violated when the Town "compelled" him to appear to identify the driver of his vehicle, causing him to spend significant time and money. In response, the Town argues that municipal liability cannot be imposed, because McNeill describes an isolated incident resulting from his interaction with a municipal employee. The Town further argues that McNeill's assertion that he was compelled is not credible because it contradicts the written citation, which provides a number of options for dealing with the ticket, including some by mail. The Town argues that McNeill's appearance was his own choice.

In order to hold a municipality liable, a plaintiff must show that he was deprived of a constitutional right by someone acting under the "color of law" and that the deprivation resulted from an established municipal policy or custom. Monnel v. Dep't of Social Services, 436 U.s. 658, 694, 98 S. Ct. 2018, 3027 (1978). There is no evidence before the court to support a finding that the Town has a policy or custom of requiring cited drivers to appear in the municipal court.

Assuming without deciding that the Thirteenth Amendment can be asserted in a Section 1983 action, the court finds that McNeill's claim would fail on the merits besides. There is no genuine issue of material fact on the issue of compulsion. McNeill cannot rely on his own affidavit

starting he felt compelled in the face of the traffic citation document, which does not require his appearance. The face of the traffic ticket and complaint informs the recipient about the violation and requires the recipient to return an acknowledgement of receipt. The form sets out four options for the recipient: (1) assert that someone else was driving or that someone else owned the vehicle at the time of the violation; (2) pay the fine; (3) attend traffic safety class, if eligible; or (4) contest the violation by showing up at the time designated on the summons to plead not responsible or not guilty. It is patently clear that McNeill decided to appear in Paradise Valley Municipal Court because he had an axe to grind about photo radar, not because he was required to do so. McNeill is entitled to assert what he believes to be his rights, but he is not entitled to compensation for the costs of doing so.

D. Right to "Be Free From Government Interference"

McNeill argues that the Town's photo radar system intrudes unlawfully on his "right to be left alone." In response, the Town maintains that there is no constitutional right to be free from botherment, particularly on a public street, citing Schenck v. Pro-Choice of Western New York, 519 U.S. 357, 383, 117 S. Ct. 855 (1997), and no generalized constitutional right to privacy, citing Katz v. United States, 389 U.S. 347, 350-51, 88 s. Ct. 507, 510 (1967).

Schneck is inapposite, for it concerns a putative right to be free from private attempts to persuade, and it does not address privacy intrusions by municipal authorities. 519 U.s. at 383, 117 S. Ct. at 870.[7] But it is true that the Constitution does not guarantee the right to go through life insulated from contact with the government. For example, attempts to find such a right in the First Amendment have been rejected. The First Amendment does not prevent the

government from collecting intelligence data on citizens, where the surveillance does not cause "specific objective harm or a threat of specific future harm." Laird v. Tatum, 408 U.S. 1, 14, 92 S. Ct. 2318, 2326 (1972); cf. Presbyterian Church v. United States, 8870 F. 2d 518, 522 (9th Cir. 1989).

Instead of guaranteeing freedom from all government intrusions, the Constitution has been read to limit only unreasonable intrusions. Police surveillance is tested as a "search" under the fourth Amendment by asking (1) whether an individual had a subjective expectation of privacy that was intruded on, and (2) whether society is prepared to recognize that expectation as reasonable. Texas v. Bond, 529 U.S. 334, 338, 120 S. Ct. 1462, 1465 (2000). As a matter of law, citizens are afforded less privacy in their cars. "A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." United States v. Knotts, 460 U.S. 276, 281, 103 S. Ct. 1081, 1085 (1983). Accordingly, McNeill had no privacy interest driving through Paradise Valley that the Town's photo radar violated. The Town's motion for summary judgment on this claim is granted.

E. Eighth and Ninth Amendment

While McNeill has listed violations of the Eighth and Ninth Amendment in his complaint, he has failed to demonstrate that he has satisfied the elements needed to make out a claim under either. The court reads the Town's argument about municipal liability to target these claims as well. Any hardship McNeill suffered as a result of his traffic citation has not been shown to have resulted from a

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[7] Schenck, it will be recalled, addressed the terms of an injunction against protesters who, the district court found, harassed persons attempting to enter an abortion clinic.

policy of the Town's. Therefore, summary judgment on these claims is granted to the town.

III. Motion for Return of Security

By order of June 21, 1999, the court required McNeill to deposit $1200.00 with the clerk of the Court as security to cover the costs of anticipated depositions. McNeill contends that he would like to have access to the funds in order to conduct the depositions. The Town has objected to granting the motion, stating that the security is necessary. The court understands the Town's position to be that security is necessary only if this matter goes forward. Since the Fourth Amendment claim survives the cross-motions for summary judgment, McNeill is not yet entitled to get his money back.

THEREFORE IT IS ORDERED, denying Plaintiff's Motion to Compel (doc. #108).

IT IS FURTHER ORDERED, granting in part and denying in part Defendant's Motion for Summary Judgment (doc. #101).

IT IS FURTHER ORDERED, denying Plaintiff's Cross-Motion for Summary Judgment (doc. #105).

IT IS FURTHER ORDERED, denying Plaintiff's Motion for Order Returning Security of Cost (doc. #109) and denying Plaintiff's Motion to Accelerate (doc. #110) as moot.

IT IS FURTHER ORDERED setting a status hearing on May 14, 2001 at 2:00 p.m. at which time the further processing of this case will be discussed. Either party may appear telephonically.

DATED this 6 day of April, 2001.

/s/ Robert C. Broomfield
Senior United States District Judge

Copies to counsel and parties of record.

Received August 15, 2001

CLERK U.S. DISTRICT COURT
DISTRICT OF ARIZONA
/s/ JH Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MICHAEL MCNEILL
Plaintiff,

vs.

TOWN OF PARADISE VALLEY, et al.,
Defendants.

Several motions are pending before the court. The principal motion is Defendant Town of Paradise Valley's Motion for Judgment (doc. #133), one court heard oral argument August 13, 2001. Having considered the matter carefully, the court now rules on the summary judgment

motion. At this time the court also resolves Plaintiff's Cross-Motion (doc. #142), Defendant's Motion to Strike (doc. #145), and Plaintiff's Motion for reconsideration (doc. #131).

BACKGROUND

As the court has already issued two orders on dispositive motions, see Order of December 14, 19 (motion to dismiss) and Order of April 9, 2001 (motions for summary judgment), it presumes general familiarity with the facts of

this case. The issue arises out of a photo radar civil traffic citation issued to Plaintiff in August 1997. The sole remaining claim is Plaintiff's claim that his Fourth Amendment rights were violated by the issuance of the citation. Defendant and Plaintiff cross-moved for summary judgment on this claim previously. The court determined that an essential piece of evidence lacked necessary foundational support, however, and denied the motions. Thereafter, on the last day of the period for filing dispositive motions, May 14, 2001, Defendant filed another summary judgment motion as to this Fourth Amendment claim. It is this last motion that the court addresses here.

DISCUSSION

A. Summary Judgment

At the outset, the court clarifies how Plaintiff's "Cross Motion for Summary Judgment" will be considered. Plaintiff's brief was filed on July 19, 2001, well after the dispositive motion deadline, thus rendering it nonviable as a summary judgment motion. The question becomes whether to strike the cross-motion, as Defendant proposes, or to consider it as a response to Defendant's motion. The court finds that treating the cross-motion as a response is the better choice. Plaintiff had requested additional time to file a response to Defendant's motion, and the court allowed an extension until July 20, 2001. Order of June 27, 2001 (doc. #141). The timing of the cross-motion, and the fact that no other response was filed, suggests that Plaintiff intended the cross-motion to serve as a response. In addition, the arguments in the cross-motion may fairly be read to respond to Defendant's motion. The court finds the extreme measure of striking the cross-motion unwarranted, and proceeds to the motion.

In determining whether to grant summary judgment, the court will view the facts and inferences from

these facts in the light most favorable to the nonmoving party. Matsushita Elec. Co. v. Zenith Radio Corp., 475 U.S. 574, 577 (1986). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). A material fact is any factual dispute that might affect the outcome of the case under the governing substantive law. Id. At 248. A party opposing a motion for summary judgment cannot rest upon mere allegations or denials in the pleadings or papers, but instead must set forth demonstrating a genuine issue for trial. See e.g., California Architectural Build. Prods., Inc. v. Franciscan Ceramics, 818 F.2d 1466, 1468 (9th Cir. 1987). Only admissible, properly authenticated evidence may be considered on a Rule 56 motion. Canada v. Blain's Helicopters, 831 F.2d 920,925 (9th Cir. 1987).

Plaintiff's Fourth Amendment claim asserts that the Town did not have a sufficient basis to issue him a traffic citation for speeding. As described in previous orders, the photo radar system functions by taking pictures of the drivers and the license plates of speeding vehicles and issuing citations to the registered owner of those vehicles. Plaintiff's objection centers on the Town's inference that a vehicle's owner is the person likely to be driving it while speeding, or at least to know who the speeder is. The court has rejected Plaintiff's general squeamishness about the photo radar procedure, finding that the inference from vehicle registration records creates reasonable grounds for the citation. The court has required the Defendant to show that the citation was properly issued to Plaintiff, however.

In order to be valid, a citation must be either sworn or certified. A.R.S. § 28-1561. In moving for summaray judgment previously, the Defendant submitted a

certification by Officer Coppola. This certification aimed to connect the officer's photo radar monitoring activities with the issuance of Plaintiff's traffic citation, without demonstrating an adequate evidentiary foundataion, In the absence of a certification to support the citation, the court denied Defendant on the Fourth Amendment claim.

In moving for summary judgment again, Defendant attempts to remedy the problems with the certification. It submits and affidavit from Officer Coppola describing the photo radar deployment process. Coppola states that on August 19, 1997, he was trained and qualified to operate the Town's photo radar device. DSOF (doc. #134), Ex. A (Coppola Aff.) ¶ 3. He tested the device before and after operating it and ensured it was working properly. Id. ¶ 5. When the device detected a speeding vehicle, it took a picture of the driver and of the license plate. Id. ¶ 9. The computer system for the device then recorded the information regarding the speeding vehicle. Id. ¶ 10. Several vehicles were identified by the device as speeding that day. Afteng thdeployment, coppola obtained a print-oucles recorded speeding. Id. ¶ 11.[1] On August 19, 1997, Coppola executed a certification that he had reasonable grounds to believe that each of the vehicles listed on the print-out had been speeding. Id. ¶ 12. Once Coppola executed the certification, the certification and print-out was used to issue traffic citations. Id. ¶ 16. The print-out identified Plaintiff as the owner of one of the vehicles. Coppola identified the certification previously submitted by Defendant as thegnd1 i997. Id. ¶ 14.

Defendant contends that in light of Coppola's

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[1] A redated version of the print-out is included in Defendant's Reply. At oral argument, Plaintiff submitted an exhibit that contained an unredacted copy of the print-out. The unredacted copy is under seal with the court

affidavit, and the fact that Plaintiff has not disputed that he owned the truck identified as speeding, there was reasonable grounds for the issuance of the traffic citation to Plaintiff. The court is inclined to agree in the absence of a persuasive rebuttal by Plaintiff.

Plaintiff responds with a series of objections Defendant's foundational evidence. He first argues that the affidavit is not admissable because it is not notaraized. Defendant correctly points out that notaraization is not necessary because the affidavit includes a statement recognizing that it is taken under penalty of perjury, pursuant to U.S.C. § 1746. To be doubly safe, Defendant also submitted a notarized affidavit in connection with its reply. The affidavit is admissible.

Plaintiff next identifies a discrepancy in the typefaces of the first two pages and the signature page of the affidavit. He argues that the affidavit is not trustworthy. In reply, Defendant explains that the affidavit was faxed to Coppola and Coppola faxed back only the signature page. The reply cfidavit from Coppola explaining his actions and stating that he read and ascribed to the entire affidavit. The mere fact of the varying typefaces is no ground for disqualifying the affidavit.

Plaintiff's third contention—that he has had no opportunity to "test the sufficiency" of the certification Coppola signed—is disproved by the facts. Plaintiff was given leave to depose Coppola, and although a date was set, Plaintiff canceled without rescheduling. Plaintiff's contentions on this score are waived.

Finally, the court has already considered and rejected Plaintiff's other arguments concerning the admissibility of the traffic citation.

More substantively, in the body of his response brief, Plaintiff argues that his Fourth Amendment claim turns on the court's construction of the Arizona statute

permitting certification in lieu of a sworn citation. Plaintiff points out that A.R.S. § 28-1561 requires unsworn traffic citations to "contain" certifications, but he fails to explain how this requirement was not met. The certification was clearly incorporated at line 9 of the citation This argument has no merit.

Plaintiff also contends that the Town's Code elides the state's certification requirement. Plaintiff reaches this conclusion by referring to the Code's that in the absence of probative contrary evidence, vehicle registration information can identify the person responsible for a traffic violation, The court finds Plaintiff's quarrel with the Town Code similarly fruitless. The certification requirement is not eviscerated by reliance on vehicle registration information.[2]

At oral argument, Plaintiff asked the court to take judicial notice that corporations cannot drive cars. He employs this fact to suggest that the certifications of Officer Coppola are not trustworthy, because Coppola's certification includes cars belonging to corporations. Plaintiff argues that no police officer could reasonably certify that corporations were drivng these speeding vehicles. The court will judicially note that while

Corporations cannot drive and employees can. In any event this line of argument is not relevant, because McNeill himself is not a corporation and it is undisputed that he was driving the speeding vehicle. The court rejects Plaintiff's attempt to impugn Copploa's testimony.

The court has considered Plaintiff's remaining

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[2] This section of the response contains the following bit of contentious rhetoric: "Plaintiff recomnends that the town's agents catch the next boat to Buenos Aries (sic) for the purpose of living out their lives in the company of the other surviving Nazis left in this world, and take their lawyers with them!" Response at 8. Not only is the suggestion of taking a boat from Phoenix a stretch, but the posturing is decidedly unhelpful..

contentions—such as his belief that the traffic citation effected an unlawful search of his mind and person by requiring him to appear in court—and finds them without merit. Defendant's motion for summary judgment shall be Granted.

B. Reconsideration

On April 17, 2001 Plaintiff filed a motion for reconsideration of the court's decision of April 6, 2001. A district court may reconsider its grant of summary judgment under either Federal Rule of Civil Procedure 59 (e) (motion to alter or amend a judgment) or Rule 60(B (relief from judgment). School Dist. No. 1J Multnomah County, v. ACandS, Inc. ("Multnomah County"), 5 F.3d 1255, 1262 (9th Cir. 1993). Plaintiff does not indicate the basis for his motion.

1. Rule 59 (e)

Reconsideration RULE59 (e) is appropriate if the district court (1) isd with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law. Multnomah County, 5 F.3d at 1263. A reconsideration motion should not merely present arguments previously raised. See Backlund v. Barnhart, 778 F.2d 1386, 1388 (9th Cir. 1985.

In moving for reconsideration, Plaintiff argues that the court erred in finding no violation of his Eighth, Ninth, Thirteenth and Fourteenth Amendment equal protection rights. The court also found no violation of Plaintiff's asserted right to be free from undue government interference, which Plaintiff anchored to the Fifth Amendment. While the court agrees with Plaintiff's general proposition that constitutional rights are important, Plaintiff still fails to show that any of his constitutional rights were violated.

a. *Fourteenth Amendment*

First, Plaintiff repeats his argument that photo radar is unconstitutional because vehicle ownership does not constitute sufficient evidence of the identity of the speeder. He argues that Defendant's inference of liability based on vehicle ownership records violates the due process guarantees of the Fourteenth Amendment. Due process was not the claim previously before the court, however. Plaintiff alleged that his equal protection rights were denied by photo radar, not his due process rights. See Order at 16. The court shall not consider a due process claim for the first time on a motion to reconsider.

b. *Fifth Amendment*

Plaintiff also argues that the use of photo radar to link truck violates his Fifth Amendment rights. To determine what putative Fifth Amendment rights Plaintiff invokes, the court refers to Plaintiff's cross-motion for summary judgment and his Amended Complaint filed June 23, 1999. The complaint alleges that Plaintiff's Fifth Amendment rights were violated when he was issued an unsworn traffic citation, Am. Compl. (doc. #28) ¶ 17, 19; that the practice of issuing citations based on vehicle ownership violates the Fifth Amendment generally, id. ¶ 18; and that he has a general right to be left alone pursuant to a great number of amendments, including the Fifth, id. ¶ 26. In his cross-motion for summary judgment, filed January 19, 2001, Plaintiff listed two ideas under his Fifth Amendment claims. First, he argued this "to be left alone by government" had been violated, and second, he argued a violation in connection with incidents the court has previously dismissed from consideration.

In its prior order, the court perceived the complaint and cross-motion as roughly coextensive. As to the second of the two arguments made in the cross-motion, the court

did not discuss any of the decided issues that Plaintiff was attempting to resuscitate. As to the former argument, the court attempted to identify a "right to be left alone" that would encompass freedom from traffic surveillance in other constitutional provisions without success. See Order at 19-20. The court did not, however, unequivocally state that no such Fifth amendment right exists.

In his pleadings and briefs, Plaintiff proceeds on the assumption that such a right exists. Such an assumption is not warranted. At this point, in order to prevail on his motion for reconsideration, Plaintiff has to show (1) that the fifth amendment right he proposes has been or should be recognized, and (2) that the court erred in either (a) failing to identify a material issue of fact as to whether Defendant's actions violated that right or (b) failing to recognize that Plaintiff was entitled to judgment as a matter of law. He has not done so. Surely Plaintiff is convinced that the facts show a violation, but he has not demonstrated the legal basis of his claimed right. There must be some good reason why Plaintiff;s claim of privacy should succeed against society's interest in monitoring the roads to ensure safe conditions. Society has a legitimate interest in containing the negative results of others' risk-taking. See Lawrence H. Tribe, American Constitutional Law ¨ 15-12 (2d ed. 1988) (discussing the constitutionality of helmet and seat belt laws). But Plaintiff does not even describe the interest he believes is protected, or explain how his expectations were violated. How Plaintiff would fill in these gaps is not obvious. After all, the roads are public spaces, maintained with taxpayer funds, and Plaintiff's mode of driving is public conduct. If there is a right not to be accountable for public conduct, Plaintiff does not explore it. To the extent that he suggests that he should be responsible for his conduct only if he speeds when consciously aware of government monitors, the court

does not foreclose this as a constitutional possibility, but it is not persuaded by Plaintiff's presentation of the argument. While the court is conscious of Plaintiff's status as a pro se litigant, the court will not undertake to do his work for him on a motion for reconsideration. [3]

Moreover, on closer inspection of the complaint, the court perceives Plaintiff's "right to be left alone" argument as an argument that heshould not have been required to appear in Paradise Valley to defend the traffic citation. If the court's understanding of Plaintiff's argument is correct, there is no fifth amendment claim. As explained in the april order, the traffic citation did not compel Plaintiff to appear. The court rejected Plaintiff's characterization of the onerousness of Defendant's traffic citation procedures. Contrary to Plaintiff's asertions that he was unjustly required to go to great expense to "defend himself against corrupt public officials," Plaintiff had four options when he received the citation and was not obligated to drive from South Carolina to Phoenix. Plaintiff's choice to make the drive cannot form the basis for a constitutional claim, since the burdensome driving was not compulsory. Thus, it appears that even if there were a pertinent Fifth Amendment right, Plaintiff did not allege facts involking it, and his claim would have to be dismissed. [4] Ultimately, no matter how the Fifth Amendment claim is construed, Plaintiff does no more than rehash the argument he presented the court before. This is not a proper basis for a motion for reconsideration pursuant to rule 58(e), and the motion must fail.

2. Rule 60(b)

If Plaintiff's motion to reconsider were deemed a

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[3] The court does not take a position whether a privacy right to be free from municipal interference can be grounded in the Fifth Amendment, as opposed to the fourteenth

rule 60(b) motion, relief would still be unavailable. Rule 60 (b) provides for reconsideration only upon a showing of (1) mistake, surprise, or excusable neglectl (2) newly discovered evidence; (3) fraud; (4) a void judgment; (5) a satisfied or discharged judgment; or (6) extraordinary circumstances which would justify relief. Multnomah County, 5 F. 3d at 1263. "A party seeking reconsideration must show more than a disagreement with the Court's decision, and recapitulation of the cases and arguments considered by the court before rendering its original decision fails to carry the moving party's burden." United States v. Westlands Water Dist., 134 F. Supp. 2d 1111, 1131 (E.D. Cal.. 2001 (internal quotations omitted). Plaintiff's motion does not meet any of the six prongs. Therefore, the motion for reconsideration is denied.

THEREFORE IT IS ORDERED, redesignating Plaintiff's Cross Motion for Summary Judgment (doc. #142) as a Response to Defendant's Motion for Summary Judgment.

IT IS FURTHER ORDERED, denying Defendant's Motion to Strike (doc> #145).

IT IS FURTHER ORDERED, granting Defendant's Motion for Summary Judgment (doc. #133).

IT IS FURTHER ORDERED, denying Plaintiff's Motion for Reconsideration (doc. #131).

IT IS FURTHER ORDERED, denying all other pending motions as moot. The clerk is directed to enter Judgment for Defendants and to terminate the case.

DATED this 14 day of August, 2001/

/s/ Robert C. Broomfield
Senior United States District Judge

Copies to counsel and parties of record

APPENDIX IV

Filed
AUGUST 15, 2001
CLERK U.S. DISTRICT COURT
DISTRICT OF ARIZONA
/s/ JH , Deputy

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JUDGMENT IN A CIVIL CASE

Michael McNeill,)
)
Plaintiff(s),)
v.)
)
Town of Paradise Valley,)
et al.)
Defendant(s).)

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the

jury has rendered its verdict.

XX **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED per the Court's order of August 15, 2001, granting Defendants' motion for summary judgment, this case is closed. Plaintiff to take nothing.

August 15, 2001
Date

RICHARD H. WEARE
District court
Executive/Clerk
/s/ J Hyatt
(By) Deputy Clerk

Cc: (all counsel)

FILED
AUGUST 19, 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Michael McNeill,
Plaintiff-Appellant,
V.
TOWN OF PARADISE VALLEY, an Arizona town; et al,
Defendants-Appellees.

No. 01-17003
D.C. No. CV-99-00332-RCB

Appeal from the United States District Court
For the District of Arizona
Robert C. Broomfield, District Judge, Presiding
Submitted August 12, 2002
Before: SCHROEDER, Chief Judge, TASHIMA and RAWLINSON, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Michael McNeill appeals the district court's judgment in favor of defendants in his action alleging civil

rights and Racketeer Influenced and Corrupt Organization Act ("RICO") violations stemming from the issuance of a traffic citation on the basis of a photo radar. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo, *Barnett v. Centoni*, 31 F.3d 813, 815, 816 (9th Cir. 1994), and we affirm.

The district court properly dismissed the 42 U.S.C. § 1983 and RICO claims against Johnson and Lynch on grounds of judicial immunity, and Kennedy on grounds of prosecutorial immunity. *See Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986) (en banc).

A municipal entity cannot constitute a RICO enterprise; therefore, the RICO claim fails. *See Lancaster Comm. Hosp. V. Antelope Valley Hosp.*, 940 F.2d 397, 404 (9th Cir. 1991).

Summary judgment for Paradise Valley was proper because sending a traffic citation to the registered owner of a vehicle based on the photo radar system does not constitute a seizure under the Fourth Amendment. *See Brower v. County of Inyo*, 489 U.S. 593, 596 (1989) (A "seizure" under the Fourth Amendment "requires an intentional acquisition of physical control"). Additionally, because McNeill successfully challenged the citation in municipal court, he received all the process he was due. *Cf. Brady v. Gebbie*, 859 F.2d 1543, 1554 (9th Cir. 1988).

The district court properly denied McNeill's motion for a temporary restraining order. *See City of Los angeles, v. Lyons*, 461 U.S. 95, 111-112 (1983).

We have considered McNeill's remaining contentions and conclude that they lack merit.

AFFIRMED.

FILED
MARCH 4, 2003
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL MCNEILL,
Plaintiff-Appellant,
V. Arizona (Phoenix)
TOWN OF PARADISE
VALLEY, an Arizona
Town; et al.,
Defendants-Appellees.

No. 01-17003
DC# CV-99-00332-RCB

Before: SCHROEDER, Chief Judge, TASHIMA and RAWLINSON, Circuit Judges

The panel votes to deny the petition for panel rehearing and the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. app. P. 35.

The petition for panel rehearing and petition for rehearing en banc are denied.

No further filings shall be accepted in this closed appeal.[1]

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[1] The District Court's order denying Petitioner's motion for reconsideration is stated within doc. 148 found in Appendix III.

CONSTITUTION OF THE UNITED STATES

AMENDMENT (IV.)

Searches and seizures

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT (V.)

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, lib

erty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT (VIII.)

Excessive bail, fines, punishments

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT (IX.)

Construction of enumerated rights

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT XIII.

§ 1. Slavery abolished

Section 1. Neither slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

AMENDMENT XIV.

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARIZONA CONSTITUTION

ARTICLE III
DISTRIBUTION OF POWERS

The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and, except as provided in this Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.

ARTICLE IV
LEGISLATIVE DEPARTMENT
PART I. INITIATIVE AND REFERENDUM

Sec. 1982. - Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person

within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

ARTICLE 4, PART 1, SECTION 1

§ 1. Legislative authority; initiative and referendum

Section 1. (1) **Senate; house of representatives; reservation of power to people**) The legislative authority of the State shall be vested in a Legislature, consisting of a Senate and a House of Representatives, but the people re serve the power to propose laws and amendments to the Constitution and to enact or reject such laws and amendments at the polls, independently of the legislature; and they also reserve, for use at their own option, the power to approve or reject at the polls any Act, or item, section, or part of any Act, of the Legislature.

Fed. R. Civ. P. Rule 56(c)

Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixing for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

ARIZONA REVISED STATUTES

§ 28-1062. Certification of Uniform traffic complaint forms; certification; false certification

A. Uniform traffic complaint forms need not be sworn to if they contain a form of certification by the issuing officer in substance as follows:

"I hereby certify that I have reasonable grounds to believe and do believe that the person named herein committed the offense or civil violation described herein contrary to law."

B. A false certification under the provisions of subsection A constitutes perjury

Added by Laws 1962, Ch. 67, § 1. Amended by Laws 1983. Ch. 271. § 48, eff. Jan. 1, 1984.

§ 28-1561. Certification of uniform traffic complaint forms; false certification

– A. Uniform traffic complaint forms need not be sworn to if they contain a form of certification by the issuing officer in substance as follows: "I hereby certify that I have reasonable grounds to believe and do believe that the person named herein committed the offense or civil violation described here in contrary to law."

B. A false certification under the provisions of subsection A is perjury.

Added as § 28-3761 by Laws 1995, Ch. 132, § 3, eff. Oct. 1, 1997/ Renumbered as § 28-1561 by Laws 1995, Ch. 76, § 6, eff. Oct. 1, 1997.

Section 11-2-18 Presumptive Operator 48, 153, 172

A. If any vehicle unoccupied by a licensed driver is found upon a street or roadway in violation of any provision of this Article Title 28, Chapter 6, Article 14 of the Arizona Revised Statutes; or if any vehicle has been driven in violation of the speed restrictions of this Article or Title 28, Chapter 6, Article 6 of the Arizona Revised Statutes or A.R. S. 28-797, then proof of the identify of the person in whose name such vehicle is registered pursuant to Title 28, Chapter 3 of the Arizona Revised Statutes may be sufficient evidence that such person was responsible for such violation, in the absence of probative contrary evidence and if the magistrate is so persuaded.

B. Nothing in this Section shall limit the defenses to or evidence otherwise probative and admissible concerning such violation or responsibility therefore.

C. The registered owner of such violation, if not the person responsible for such violation, shall upon request inform the magistrate or Town attorney of the iden tify of the person responsible for such violation, if known.

AFFIDAVIT
OF
Michael McNeill

County of Asotin)
)
State of Washington)

Michael McNeill being first duly sworn according to law deposes and states:

1. Michael McNeill "affiant" is the Plaintiff in CIV 99-0332 and affiant has personal knowledge of all things testified to herein;
2. On or about September 8, 1997 affiant reported for work at Oconee Nuclear Generating Station being employed by Power Equipment Maintenance 'PEM" as a Reactor Cooling Pump mechanic being paid an hourly rate of twenty five (25) dollars per hour and four hundred ninety (490) dollars per week in per diem and travel pay. Affiant's wages when working seven days per week, twelve hours per day were $2650.00 per week plus $490.00 per diem.
3. As a condition of being granted unescorted access to the most secure areas of nuclear facilities, affiant must undergo background investigations to insure his continuing trustworthiness and reliability; a condition of employment. Affiant must also pass both drug and alcohol screens. Site access and radiation worker requirements specific to the particular site he wishes to work at. Affiant has never used marijuana nor any other controlled substance e.g., cocaine, methamphetamines, etc.. As a condition of employment, affiant must report anything that could affect his fitness for duty.

4. On or immediately after September 10, 1997 affiant received a telephone call from affiant's daughter living in Phoenix, Arizona who stated to affiant that affiant's mail contained a traffic ticket complaint. Affiant requested specific information and was told:

(a) The complaint originated from the Paradise Valley Municipal court and that the date of the alleged infraction was August 19, 1997;

(b) Affiant pursuant to the summons stated on the face of the complaint was to have appeared on September 10, 1997;

(c) The summons stated that if affiant failed to appear as directed, judgment would be entered against him, affiant would be fined and his drivers license suspended;

(d) Affiant requested and was given the complaint number and the telephone number to the Paradise Valley municipal court.

5. Because of the requirements of Affiant's conditions of employment as stated in part in paragraph 3 above and because affiant believing his continued employment was in extreme jeopardy as a result of the threat to suspend his drivers license, as soon as possible, affiant never having seen the complaint, contacted the office of the clerk of the Paradise Valley Municipal Court where in a telephone conversion the following statements were made and information given and received:

(a) The clerk told Affiant the complaint was a "Photo Radar traffic ticket, to which Affiant responded: the possibility did not exist that affiant was in the photograph on the date of August 19, 1997 and that affiant was neither the driver nor an occupant of the vehicle. Affiant told the clerk to obtain a copy of his drivers license from the department of motor vehicles stating it would prove

affiant was not the driver;

(b) Affiant asked for and was granted a continuance until October 24, 1997;

(c) Affiant was told he had to appear on October 24, 1997 for arraignment, enter a plea and identify the driver of the vehicle;

6. At no time was affiant informed of that he would not need appear if he: a) identified the driver of the offending vehicle or, b) sent a copy of affiant's drivers license to the court.

(a) The possibility does not exist that affiant could with certainty identify the driver of a vehicle where affiant was not an occupant thereof nor within any number of miles of the vehicle at the time of the alleged violation absent seeing at a photograph of the driver which affiant has never seen.

7. On or about October 3, 1997 affiant submitted several motions to the Paradise Valley court and among those were motions to dismiss, plead not guilty, motion to enlarge for discovery and others. (a) The Paradise Valley Court in an order dated October 14, 1997 a) refused to accept affiant's not guilty plea, b) denied Affiant's motion to discuss and, c) regarding motion to enlarge RE: discovery the court stated:
" "Defendant's motion to enlarge time is allowed for discovery is denied. Pursuant to Arizona Rules of Court, Rule 14(a) Rules of Procedure in Civil Traffic Violation Cases, "No pre-trial discovery shall be permitted absent extraordinary circumstances. Defendant has not shown extraordinary circumstances." "

(b) As a result of the court's order Plaintiff did not attempt discovery; As a result of the court's order Plaintiff believed the term "no pre-trial discovery' meant affiant was not allowed to see any photograph or document until he was in the batter's box at trial.

8. On or about October 31, 1997 Plaintiff was served by certified mail with a subpoena to testify for the State and a summons to appear and a complaint which stated that if Plaintiff did not appear as ordered, default judgment would be entered against him, a fine levied and Plaintiff's drivers license suspended. Further the complaint stated Plaintiff could plead not guilty. Mike Coppela did not sign the complaint.
9. On or about November 23, 1997 affiant was laid off work at Oconee Nuclear Station. On or about December 3, 1997 affiant filed for an inujunction with the Federal court in Greenville, South Carolina seeking an order prohibiting Paradise Valley acting against affiant who wished to remain in the area for employment purposes. On December 9, 1997 the court denied affiant's request for an injunction stating the court lacked jurisdiction.
10. On or about December 3, 1997 affiant was asked if he would accept work at Catabwa Nuclear Generating station. Affiant started work on or about December 4, 1997.
11. On December 12, 1997 Plaintiff filed a further motion to continue and faxed a copy of said motion to the Clerk of the Paradise Valley Municipal Court. About that time Plaintiff became aware his motion for an injunction before the federal court had been denied for want of jurisdiction. Because Plaintiff did not know if the motion would be granted, because Plaintiff feared some sort legal skullduggery by defendant's agents and because Plaintiff was under subpoena commanding to appear and testify for the state on December 18, 1997 Plaintiff asked to be placed on the layoff list and traveled west for the purpose of appearing immediately in the Paradise Valley Municipal Court.

12. Upon arriving in the area Plaintiff twice called the

Clerk of the Paradise Valley Municipal Court requesting to appear and was informed that his motion to continue had been granted and that he would have to wait until the issuing officer was available to appear, which was Plaintiff's court date of February 23, 1998.

13. At no time did any person tell Plaintiff he could view any picture. Plaintiff was sent paper work from Paradise Valley indicating that the so called trial date was actually an arrignment date.
14. On or about the Friday before Plaintiff's trial date Plaintiff called the clerk of the court in order to determine his place on the docket. Plaintiff was informed that six individuals were on the docket, persons were called in alphabetical order and that Plaintiff would be the fifth person called for trial.
15. On February 23, 1998 Plaintiff traveled to the Paradise Valley Court where the following events took place:

(a) Plaintiff arrived at the court complex prior to the doors to the building being unlocked. Plaintiff observed a person unlock the doors and immediately entered the building where he filed two motions with the clerk. Plaintiff then went to the window of the town attorney and asked to see her. Plaintiff was informed the town attorney was not yet at work and Plaintiff observed copies of his motions being placed in an array of open inter office type mail boxes. Plaintiff returned to the town attorneys window several times between 08:15 and 09:00 noting each time the documents had not moved. Several times Plaintiff asked if the town attorney had arrived, the answer was "no". At approximately 09:30 Plaintiff noted the documents were gone and asked if the town attorney had received Plaintiff's motions,the answer was "yes".

(b) Three police officers entered the court room at various time and all at various times inspected the file of

Michael McNeill.

(c) When it came time for Plaintiff to be called by alphabetical order he was passed over. Plaintiff at that time thought the court (Elsa Lynch) was preparing for vigorous extended legal arguments on Plaintiff's motions to dfismiss for lack of jurisdiction and lack of probable cause. Plaintiff's name, (defendant in the matter before the Paradise Valley Court) was called for trial when all other defendants had left the room and all police officers were present.

(d) Plaintiff and a police officer who identified himself as Mike Coppela were then sworn in and sat down in the witness chairs. The court then asked both Plaintiff and Coppela if they remembered her instructions as to how evidence would be taken and the rules of court. At that time Plaintiff inquired of the court as to whether or not we were on the record to which Judge Elsa Lynch stated "yes" and further instructed Plaintiff's testimony would be recorded. Plaintiff at that time immediately informed the court that he was objecting to the entire proceeding;

(e) Plaintiff made known to the court that he wished to argue his objections to the proceeding but the court told Plaintiff to wait until she had reviewed the record;

(f) While reviewing the record Judge Lynch reviewed Plaintiff's motions to dismiss for lack of jurisdiction and lack of probable cause;

(g) After a several minute delay the Court Judge (Elsa Lynch) stated the Town Attorney had moved to dismiss and asked if Plaintiff had any objection to said dismissal; Plaintiff attempted to voice his objections including the fact that Plaintiff had two (2) motions to dismiss before the court however Elsa Lynch told Plaintiff (defendant in No. 0223473A) "You be quiet";

(h) Plaintiff asked the court for permission to ask the court a question as Plaintiff wanted to know how the

town attorney made a motion to dismiss never having

opened his/her mouth nor uttered any words nor had Plaintiff been served with any such motion;

(I) Elsa Lynch immediately ordered defendant Mike Coppela and two other police officers to escort Plaintiff from the court room having never ruled upon either of Plaintiff's motions to dismiss nor the States non existent alleged motion to dismiss;

(j) Plaintiff left the court room and went to the Clerk of the court's office in an attempt to order a record of the proceedings in No. 0223473A and other documents in preparation for a civil suit against defendants;

(k) Defendant Mike Coppela and two other police officers followed Plaintiff to, and surrounded Plaintiff at the business window of the Clerk of the Paradise Valley Municipal Court;

(l) Elsa Lynch then exited the clerk's office through a door and asked Plaintiff what was he doing there, Plaintiff stated to defendant Lynch that he wished to order a transcript of the hearing from the Clerk of the Court to which defendant Lynch responded, "there is no record, the case was dismissed"; Lynch then gave to Plaintiff a goldenrod copy of a motion to dismiss stating, "I just found this on my desk";

(m) During the conversation between Plaintiff and defendant Lynch, defendant Lynch indicated to the police officers who had surrounded Plaintiff at the clerk of the court's business window that defendant Lynch wanted Plaintiff out of the court building at which time the police officers moved closer to Plaintiff causing Plaintiff to turn his back to the window in order to face said police officers for the purpose of self defense;

(o) Plaintiff had certain knowledge that defendant Lynch intended to destroy, caused to be destroyed or hide the record in No. 0223473A.

(p) Plaintiff had reason to believe and did believe he

was in imminent danger of physical injury or death or false imprisonment for life at the hands of incorrigible police officers in cahoots with a corrupt judge who would obstruct justice by destroying evidence; Plaintiff believed if he remained at the clerks window and attempted to obtain evidence for a civil action he would not survive; Plaintiff exited the building with the police officers in close pursuit.

17. Defendant sent Plaintiff a complaint by both regular and certified mail. The complaint stated on its face: "If you fail to appear as directed in this complaint on a civil traffic violation a default judgment will be entered against you, a civil sanction will be imposed and your drivers license will be suspended." The complaint also stated: "IF YOU WISH TO CONTEST THE VIOLATION, you must appear before a judge in court on the date and time shown on the summons to plead not responsible or not guilty."
18. Plaintiff was told he had to appear and identify the driver.

Further your affiant sayeth naught.

/s/ Michael McNeill

SUBSCRIBED AND SWORN before me this 17th day of January, 2001

/s/ Harold w. Vaughn
Notary Public
My Commission Expires 2-10-2002

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MCNEILL,	) No. CV-99-332-PHX-RCB
	)
Plaintiff,	)
vs.	)
TOWN OF PARADISE VALLEY	)
	)

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE ROBERT C. BROOMFIELD
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: (Pro Se)	By: Michael McNeill 9536 W. Ross Avenue Peoria, AZ
For the Defendant:	By: Charles M. Callahan HOLLOWAY, ODEGARD, SWEENEY & EVANS 3101 N. Central Ave., Ste. 1200 Phoenix, AZ 85012
Court Recorder:	Rose Huckaby-Cotton
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August 13, 2001

THE CLERK: All rise. Court is now in session.

You may be seated.

Civil 99-332-PHX, McNeill v. Town of Paradise Valley, on for defendant's motion for summary judgment re: Fourth Amendment claim.

Counsel, please state your name for the record.

MR. MCNEILL: Michael McNeill, pro se.

MR. CALLAHAN: Charles Callahan on behalf of the defendant, Town of Paradise Valley, Your Honor.

THE COURT: Thank you. Is there anything you wish to add to what you've written?

MR. CALLAHAN: Just very briefly, Your Honor. I think the affidavit —

THE COURT: If you can come on up here if you want.

MR. CALLAHAN: Thank you, Your Honor. The affidavits that we've now submitted, the only remaining issue as you framed it in your order which is the foundation for Officer Coppela's certification. That's the only remaining issue. You found that there is no viable fourth amendment claim if the certification is valid. The only concern was over the foundation.

The affidavits now establish that the photo radar unit was working properly on August 19th. It took photo graphs of speeding vehicles. One of the photographs which has been produced on — with a date of August 19th, 1997, is a late model F150 Ford pickup truck. It's never been disputed that that pickup truck is owned by the plaintiff or that that vehicle was speeding on that date and time at that place.

Officer Coppela received a printout based upon motor vehicle records of all registered owners of the vehicles that were caught to be speeding. He issued a certification that he had reasonable grounds to believe that all of those listed had committed a speeding offense and the traffic citations were issued.

Based upon your Court's prior orders, I think that established the foundation for the certification and eliminates the Fourth Amendment claim.

THE COURT: Thank you. Mr. McNeill.

MR. MCNEILL: Your Honor, you were very kind and gave me an extension to get my brief in and counsel was given a certain amount of time pursuant to local Rule 1.10LI believe it is, 15 days to get his brief in.

Counsel was served, hand-delivered, on the 19th of July and I — what I did is I had Airborne express the documents down here so my daughter could deliver them so I would get an answer in time to reply to what I suspected was going to come in his reply brief or at least make objections to it. And that would mean that that document would have been due to me on the 3rd of August which would have given me time to type up some objections. The document was dated on the 6th. I didn't get it till the 8th and there was zero time left over in my life to make objections at that point in time. And I would like permission to do them right.

THE COURT: I think you, if I understand, you want to make objections to his reply brief in the motion for summary judgment? There isn't any such —

MR. MCNEILL: He has brought up new information in there that I wish to dispute. What we have is the same thing that we had last time here, Your Honor. We don't have the correct documents in the record. And it's material, I believe.

THE COURT: And what is it that you believe is incorrect? You can tell me about it now and let's then see what —

MR. MCNEILL: Yes. Oh, sure, certainly. He referred to a certain printout that he submitted to you. That is not the printout that was given to me which is a part of the prosecutor's file which I have the original of which

was produced to me. That printout which I would move that the entire prosecutor's file go into evidence and be made a part of the record if I can. We'll get to that.

That printout shows 21 names on it. There is my name. There is Avis Rent-a-Car a couple times, Hertz Rent-a-Car a couple times, Brophy Technical School, there's eight corporations or companies on that printout, which there is a certification, an alleged certification, attached to which uses the term defendant. There was never anything prior to the original on this motion for summary judgment where anybody came up and said that they were certifying the vehicles were speeding. Because certifying that a vehicle is speeding is like certifying the moon is full. Under 1561, he must certify that he believes that the person named in the complaint committed the offense. A police officer cannot believe that a corporation committed the offense and that is why they do not certify the tickets.

This is — I will get into the certification proper business later on. The point is if we're going to have a printout in the record, let's have the printout in the record that was produced in the file, not this what you have in front of you.

There's another important point in there, Judge, not that I think it — we can get to that. I think I went around that quite frankly. But it used a time on there when Officer Coppela took these. Mr. Coppela filed an affidavit that he was certifying a police or a printout, not the documents, not the complaints themselves. He was certifying that he got this printout. That's all that says. Okay. And on that printout it gives the time. Counsel put an affidavit into the record that shows they take this film and they send it out and then it comes back. Before it came back, it shows that Mr. Coppela filed this certification, never having seen a complaint.

Now that is one of the reasons I would like to put

into evidence at least the total printout and I would prefer instead of like last time where I had to correct an attorney and you ordered that the file be brought to you and I don't know if it was ever put into the record of if you just used it for your own use. I think there's a difference there. I don't understand what it is.

THE COURT: Well, do you have something now that you wish to place in the record?

MR. MCNEILL: Yes, I do. I would like to put the en tire — I'm sorry, because I didn't get this until like five days after then I should have, is what the problem is. This is my original prosecutor's file that was produced to me. And I would like to put the entire — I mean if we're going to put documents into the record and we're going to get court records, which in fact are still sanitized, this is a file that I got. It's got this Vicki or Victoria Paris is the one that made a statement to you before, which is not accurate. This is the entire file. So why don't — he has referred to this, this document right here, as I will show you in here. It's not one page. It's three pages. And let me just read this to you here. It gives a date and time on here starting out with September 10th at 11:00 and it runs down to — wait a minute. I'm sorry. August 19th at 11:57 and this goes down to August 19th at 2:27. Now in this and we have certification, we have Budget Rent-a-Car, we have Brophy College Prepratory School, we have Avis Rent-a-Car, we have Hertz Corporation, we have Avis again.

THE COURT: Excuse me. I thought it was the other document that you wished to offer into evidence.

MR. MCNEILL: Well —

THE COURT: Not that one.

MR. MCNEILL: This particular document is in here. This —

THE COURT: I'm sorry. Then I misunderstood.

MR. MCNEILL: This is page 66 through 69 of this

prosecutor's file which I'm just saying I would just as soon put the entire file in.

The point is — oh then we got Bill Luke Dodge here you see. Bill Luke Dodge, I made the point and I don't want to be facetious but in the fact of the matter is, pigs don't fly and coronations don't drive vehicles. And there is no police officer who can certify a belief that a corporation can drive a vehicle. It is my position that if a police officer certifies that, that police officer committed perjury and I think this applies that if he certifies he believes that the registered owner is a driver, he has also committed perjury. I'll get off that.

There was a remark made by counsel in this brief regarding I'm bringing up things that you have already ruled on and I would only point out to the Court that I have asked for reconsideration on those things because of course it is my position that the legislature of the State of Arizona puts forth a public policy of this state in the statutes. They enact statutes and that becomes the public policy of this state and it is my position that the Town of Paradise Valley cannot come forth and trump the Arizona legislature under any conditions. And the judges cannot allow other judges or anyone else or they themselves cannot trump the Arizona legislature. The Arizona legislature said this is how we want our tickets drawn up.

I'll cover one other point. I would like to — I would move to put this into evidence and to have it made a part of the record, Judge.

THE COURT: Okay. I'll — do you have any objections?

MR. CALLAHAN: Well, I don't know, Your Honor. The listing of all — the reason I only put a portion of it in and redacted it is because I don't know the need to have in a public record all the people who may have committed speeding violations, a listing of all those people. I think the important point and the only slightly relevant point is that

Mr. McNeill's name is on the printout along with other people.

THE COURT: Well, he's holding up a stack of pa

pers it looks to me like it's 25 or 30 pages thick. I don't know how tick it is. Is — are you asserting that the names of these other people are through all these various pages are only in that three-page document that he also held up?

MR. CALLAHAN: I believe they're only in the three-page document which is contained within.

THE COURT: So then your concern is with the three-page document, not the larger portion of it? Is that correct or incorrect?

MR. CALLAHAN: That's correct, Your Honor.

THE COURT: Is there any reason then to the extent it may be necessary that for these — or what he proposed to file or give to me be considered and filed under seal at least as to the three-page document?

MR. CALLAHAN: That's fine, Your Honor.

THE COURT: You have a problem with that, Mr. McNeill?

MR. MCNAILL: The only problem that — I'll leave that up to your discretion, Judge, but I would point out that out of 21 people who were ticketed on this day, of the nine that we know about for sure, nine of them did not speed in the Town of Paradise Valley.

There's still another 12 that we haven't looked at.

But if just one and a half in the four basically was someone who was given a ticket that was the driver of the car, the —

THE COURT: When you say they were not speeding, that's from your argument that they were corporate entities?

MR. MCNEILL: Yes.

THE COURT: I see. All right.

MR. MCNEILL: In other words, it'd be very easily to have 50 percent of the people that were ticketed that day not knowingly, not be the drivers of the car when they were issued the tickets. Now I have given you in my brief information from the Town of Paradise Valley which tells these companies what to do if they are ticketed. They are using the companies as to support the police powers of Paradise Valley in running down offenders.

And they're issuing them tickets knowing that they cannot be guilty. And they say right on their documents, when you call them up and you listen to them on the phone, they say we will prosecute you if you don't tell us who the driver is. Now there's something wrong with this picture. The reason that is the only objections, I don't think that these people would care that got these photo radar pictures — what this does is benefit the defendants. I don't believe there's a single person on here that I will call them up and ask them if they care if it's their name is in a public record as having gotten a photo radar ticket. What this does is cover up if we take this and hide it or whatever you do, you now, seal it. What we're doing is covering up for a police officer who said and I use — and I want to read this. Just one time.

"I certify upon reasonable grounds that I believe each of the defendants complained on this date" — okay? I ask the Court to take judicial notice of certain facts in my brief regard the fact that only real people, homo sapiens, people like you and I, can operate a motor vehicle and that the term defendant in the Statute 5161 or the term person means a real person like you or me. And would the Court tell me for the record whether it will judicially notice those facts?

THE COURT: I'll take — I'm going to rule on everything that's pending before me —

MR. MCNEILL: At that time?

THE COURT: — and I will address everything in the order.

MR. MCNEILL: Okay. It's my — my point is, Judge, that if you are a defendant, you are a real person. And certifying that this guy believes that coronations can drive vehicles is perjury. That's my point.

Okay. One other thing, I'll get out of your hair here. None of this — the testimony in the affidavits that he has submitted to you has changed. It went from he filled out this certificate on August 19th, that's the first thing he said. Now it's on August 19th or thereabout, on or about August 19th. See, it's changed. Both affidavits state essentially that he is certifying that vehicles are speeding. That does not comply with 1561. He must believe that the person named did it. He has changed this because this says, this certification says the defendant, Judge. It doesn't say the vehicles were speeding. He says — it says the person named. Okay.

All of this is irrelevant except for the fact we have police officers committing perjury and that's — and we have lawyers that are giving that information to you as the Judge. And there's something wrong with that, but in my cite of State v. Johnson, that I cited in my brief, seeing as to how he has brought this stuff up, I'd like to read this to you.

This is State v. Johnson, 184 Ariz. 521, 911 P. 2d 527, the Court of Appeals, August 30, 1994, "reconsideration denied, review denied," February 21, 1996. This is the law in the State of Arizona. And I read from paragraph eight, but I would incorporate the entire text of State v, Johnson into my arguments. No one has ever authorized a police officer to use a facsimile signature on the ticket. But here's what this court says. This has to do with motor vehicle department records.

> "It is true that a computer-generated facsimile signature is presumed to be valid certification absent

contrary evidence citing Irving 165 Ariz. 225. It is also proven that some indica of the requisite quote human involvement unquote must be apparent from the face of the document or for that foregoing reason, a computer generated facsimile signature standing alone will fail."

It states on here that it must appear on the face of the document and the face of the document is the complaint and the complaint is a photo radar ticket and nobody certifies them because they know they can all be charged with perjury under these laws. That's what's going on here. It's nothing but racketeering, pure and simple, one end to the other, corrupt public officials that he's standing up for and I leave that in your hands, sir.

THE COURT: Thank you. Anything?

MR. CALLAHAN: Very briefly, You Honor, I think I understand the argument regarding the printout list now but the fact is that it's irrelevant whether citations are being issued to corporations or not. The fact is it's undisputed that Mr. McNeill is not a corporation and if Mr. McNeill owned the truck that was caught speeding and he was is sued a ticket. I mean that's undisputed. So it's largely irrelevant as to who else is listed in the printout.

As far as it must be believed that the person driving was the speeder, this Court has already ruled that the presumption created by the town code that the registered owners are the drivers is constitutionally permissible.

But beyond that, the argument fails and the last thing I would just like to address, Your Honor, is kind of a housekeeping matter. As you know I filed a motion to strike the cross motion for summary judgment that he filed in response to this and I don't know what this Court's practice is as far as whether you want me to go ahead and respond to the cross motion for summary judgment before the motion to strike is ruled upon or wait for a ruling upon

the motion to strike? That's —

THE COURT: I'm not inclined to rule on anything that's pending before me, so there's nothing you have to do at this stage. Mr. McNeill, if you hand the document that you had — now is that your only copy?

MR. MCNEILL: No, I have a copy. This is the original, though.

THE COURT: You can either hand in the original or a copy, whichever you choose and I'll consider that in connection with the pending motions, yes.

Okay, Thank you. The matter's under advisement.

MR. CALLAHAN: Your Honor, could I just make a note as to the Bates numbers on that document he handed you so I can know for myself what is actually being filed.

THE COURT: You can look at it right after I leave and all you want to quickly just retain it and give it to me after you've looked at it.

MR. MCNEILL: Your Honor, one more question. This was the date we were supposed to have the pre-trial meeting. Is all this going to be changed and getting out of Court or something depending on what —

THE COURT: Right, either the motion gets granted, the case is over, or the motion gets denied in which event we have to have another hearing to set the —
have a pre-trial conference and set a trial date. And I'll deal with that in the order.

MR. MCNEILL: Thank you very much, sir.

THE COURT: Thank you.

THE CLERK: All rise. The Court stands adjourned.
(Proceedings Concluded as 12:31 p.m.)

CERTIFICATION

I (we) certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Dated: August 30, 2001 /s/Dianna Campbell

Supreme Court, U.S.
FILED
AUG 4 - 2003
OFFICE OF THE CLERK

No. 03-31

IN THE

Supreme Court of the United States

MICHAEL McNEILL,

Petitioner,

v.

TOWN OF PARADISE VALLEY, an Arizona town; ELSA LYNCH, a judge in the Paradise Valley Municipal Court; MIKE COPPOLA, a Paradise Valley police officer; JILL KENNEDY, Town Attorney for Paradise Valley; SHERWOOD JOHNSTON, hearing officer of Paradise Valley,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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THE COURT OF APPEALS' DECISION DOES NOT WARRANT THIS COURT'S REVIEW

Petitioner presents absolutely no compelling reason for this Court to review the Ninth Circuit Court of Appeals' decision in this matter. Petitioner's shotgun presentation of stream of consciousness, rhetoric-laced arguments fail to identify any constitutional deprivations sufficient to support a claim under 42 U.S.C. § 1983. Instead, Petitioner's brief is a regurgitation of the conclusory allegations made throughout the litigation below, and fails to identify any conflict with existing federal law or any important federal or national interest which deserves this Court's attention.

At the heart of this matter is a photo radar speeding citation issued by the Respondent Town of Paradise Valley (hereinafter "Paradise Valley") to Petitioner, as the registered owner of a vehicle which was caught speeding on Paradise Valley's roadways. (IR 134, ¶ 13; Exhibit B).[1] Once it was determined that Petitioner was not the driver of the speeding vehicle at the time of the violation, the citation was dismissed. (IR 129, Exhibit A, Doc. No. 000108). Petitioner's claim that the citation was not issued in accordance with Arizona Statute forms the basic premise for all allegations of wrongful conduct. Even beyond the fact that this premise is legally and factually wrong, both the District Court and the Ninth Circuit Court of Appeals correctly found that Petitioner's constitutional rights were in no way violated through this process.

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1. All references to "IR" are references to the Index of Record on Appeal to the Ninth Circuit. The number following the IR designation corresponds to the docket entry number of the index.

It is extremely doubtful that this type of controversy will arise again, and it is undoubtedly the uniqueness of the circumstances presented that contributed to the Ninth Circuit's decision not to publish its ruling, and to instead issue a short, but correct memorandum decision summarily rejecting Petitioner's conclusory allegations. As a result, the Ninth Circuit's ruling will have no effect whatsoever on the body of law governing § 1983 claims. Instead, the only effect of the decision is to correctly decide the case before it. Petitioner has simply failed to raise "an important question of federal law," and Petitioner's Writ should be denied. *See* Rules of the Supreme Court of the United States, Rule 10(c).

In short, Petitioner has made a "federal case" out of nothing more than a properly issued speeding ticket; a ticket which was eventually dismissed! The Ninth Circuit's ruling was proper in all respects and Respondents respectfully request this Court to deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Because Petitioner fails to provide the Court with most of the pertinent facts underlying this case, Respondents will briefly do so.

A. Paradise Valley's Photo Radar System

As an important means of traffic enforcement, the Town of Paradise Valley uses an Auto Patrol (Tm) Speed Camera Unit to detect and memorialize drivers of vehicles speeding on Paradise Valley's roadways. (IR 102, Exhibit A). Speed camera units operated by Paradise Valley police officers are stationed at various locations on roadways in Paradise Valley.

(*Id.*) When the photo radar unit detects a speeding vehicle, a photograph is taken of the driver of the vehicle, and a second photograph is taken of the rear of the vehicle, capturing the license plate. (*Id.* IR 134, Exhibit A, ¶ 9).

After processing the data and photographs, the information regarding the registered owner of the speeding vehicle is obtained from motor vehicle records. (IR 102, Exhibit A; IR 134, ¶ 11). With a list of offending drivers, the officer then causes a speeding citation to be issued to the registered owner of the vehicle. (IR 102, Exhibit A). Since Paradise Valley began using this photo radar system in 1987, the number of accidents has been cut in half, all the while the population of the town has steadily increased. (IR 102, Exhibits A, B, C).

B. Petitioner's Photo Radar Citation

Respondent Mike Coppola, a Paradise Valley police officer trained to operate the photo radar system, deployed the photo radar system to East McDonald Drive in Paradise Valley on August 19, 1997. (IR 134, Exhibit A, ¶ 2-4). Before, during, and after the deployment, Officer Coppola tested and monitored the unit to ensure that it worked properly, which it did. (*Id.*, ¶ 6-8).

It is undisputed that on August 19, 1997, Petitioner's vehicle, a 1985 Ford Pickup truck with license plate number 4WN956, was detected as going 53 miles per hour in a 40 mile per hour zone. (IR 134, ¶ 13). After the deployment was completed on August 19, 1997, the photograph of Petitioner's vehicle was developed and Officer Coppola received a printout identifying Petitioner as the registered owner of that vehicle. (IR 144, Exhibit 2, ¶ 14). Because

Officer Coppola had tested and monitored the photo radar unit, and in light of receiving a printout of vehicles that were in violation of the speed laws, Officer Coppola executed a certification which states that he had reasonable grounds to believe that each of the registered owners of the vehicles listed on the printout, including Petitioner, were in violation of Paradise Valley's speed laws. (IR 134, Exhibit A, ¶ 12-13).

Once Officer Coppola executed the certification, that certification and the printout of the vehicles in violation were used to issue traffic citations. These traffic citations were then mailed to the registered owners of the vehicles detected as being in violation. (*Id.*, ¶ 16.) In light of Officer Coppola's certification, and in light of the fact that Petitioner's vehicle was listed on the printout as speeding, a photo radar traffic citation was issued to Petitioner's Arizona address. (IR 134, Exhibit B; IR 144, Exhibit 2, ¶ 14). Paradise Valley's practice of utilizing a police officer's written certification as a basis for issuing computer generated traffic citations was expressly approved by the Arizona Supreme Court long before Petitioner was ever issued his photo radar citation. (IR 112, Exhibit A, Doc. Nos. 197-199).

C. Proceedings in Paradise Valley Municipal Court

After Petitioner received the photo radar citation, Petitioner filed a motion in Paradise Valley Municipal Court on October 3, 1997, requesting that a "plea of not guilty" be entered on his behalf with respect to the citation, and he also asked that the citation be dismissed. (IR 129, Exhibit A, Doc. No. 000129). On October 14, 1997, Respondent Hearing Officer Johnston issued its order denying Petitioner's motion to dismiss. (*Id.*, Doc. No. 000126-127). Because the photo radar citation at issue was simply a civil traffic violation,

and not a criminal violation, Hearing Officer Johnston modified Petitioner's plea of "not guilty" and entered a plea of "not responsible." (*Id.*) Because of this plea, the matter was set for hearing on December 18, 1997. (*Id.*)

As that date approached, Petitioner filed a motion to continue. (*Id.* at Doc. No. 000119). Petitioner's request for continuance was granted in part, in that he was given the maximum allowed continuance of sixty days. (*Id.* at Doc. No. 000118). However, it was not necessary for Petitioner to appear in person at the hearing, as the backside of the citation delineated four separate options for responding to the citation, three of which did not entail a personal appearance. (*Id.*, Doc. No. 000104). Of particular relevance here, Option 4 on the citation provided that if the cited person was not the driver of the vehicle, the identity of the driver could be identified on the citation and simply mailed to Paradise Valley. (*Id.*)

However, Petitioner chose to personally appear at the municipal court, and filed a second motion to dismiss on February 23, 1998. (*Id.*, Doc. No. 000109-112). Apparently, once Petitioner personally appeared at the municipal court it became clear from the photograph of the driver accompanying the citation that Petitioner was not the driver of the vehicle. Therefore, an attorney for Paradise Valley moved to dismiss the citation for the stated reason that Petitioner ". . . is not the driver of the vehicle." (*Id.*, Doc. No. 000108). Respondent Judge Elsa Lynch executed the order dismissing the complaint on that same date. (*Id.*)

Once the actual facts are considered, the correctness of the Ninth Circuit's decision becomes clear, as does the fact the Ninth Circuit's determination does not warrant further review.

REASONS FOR DENYING THE PETITION

I. Paradise Valley's Photo Radar System Comports With All Constitutional Requirements.

Petitioner is factually and legally incorrect in his assertion that Paradise Valley's Town Code operated to violate some constitutional right. To begin with, Petitioner's suggestion that Paradise Valley Town Code § 11-2-18, is in circumvention of A.R.S. § 28-1561[2] is simply a matter of interpreting two laws of the state of Arizona. This is hardly a compelling federal or national interest which deserves this Court's attention. This is especially true given the fact that the Arizona Supreme Court has **expressly approved** Paradise Valley's system and procedure for issuing photo radar traffic citations. (IR 112, Exhibit A, Doc. Nos. 197-199).

Moreover, there is no conflict between A.R.S. § 28-1561 and Paradise Valley's Town Code. A.R.S. § 28-1561 simply requires that the traffic citation be certified. Petitioner asks this Court to ignore the fact that Respondent Police Officer Mike Coppola did certify, after receiving a computer printout identifying all the registered owners of the vehicles that had been detected as speeding, that he had reasonable grounds to believe that the registered owners had committed an act contrary to law. (IR 134, Exhibit A, ¶ 12-15). As the District Court found, Officer Coppola's certification was incorporated into the traffic citation at the ninth line of the citation. (IR 148, p. 7, l. 1-2; IR 134, Exhibit B).

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2. This is the current version of the former A.R.S. § 28-1062 erroneously cited by Petitioner.

The certification by Respondent Police Officer Coppola that the registered owner was the driver of the speeding vehicle is premised on Paradise Valley Town Code § 11-2-18(a), in which it states that ". . . the proof of identity of the person in whose name the vehicle is registered . . . may be sufficient evidence that such person was responsible for such violation. . . ." (IR 101, p. 14). This presumption that the registered owner was the driver of the vehicle in no way conflicts with A.R.S. § 28-1561. More specifically, for purposes of an analysis under § 1983, this presumption is constitutionally permissible, especially given the fact that the traffic citation to Petitioner was civil in nature. *See City of Portland v. Kirk*, 518, P.2d 665, 667-68 (Ore. App. 1974) (approving a rebuttal presumption that the registered owner of a vehicle is the person who parked the vehicle); *City of Seattle v. Stone*, 410 P.2d 583, 585 (Wash. 1966) (approving a rebuttal presumption that the registered owner of the vehicle is responsible for parking it illegally). *See also Rucker v. Davis*, 237 F. 3d 1113, 1127 (9th Cir. 2001) (approving a rebuttal presumption that a tenant controls activities within his apartment and that if the presumption is not rebutted he may be evicted for allowing unlawful activities).

Petitioner does nothing to explain how Paradise Valley's photo radar system and the presumption that the registered owner was the driver of the vehicle falls below constitutional standards and resulted in a deprivation of Petitioner's constitutional rights. By failing to do so, Petitioner has failed to present any cogent reason, let alone a compelling reason, for this Court to accept review.

II. Paradise Valley Did Not Violate Any Of Petitioner's Constitutional Rights.

In Petitioner's laundry list of claimed constitutional violations, Petitioner simply repeats the conclusory allegations of constitutional violations that he has made throughout this litigation. Petitioner does not claim that the Ninth Circuit applied an incorrect rule of law, nor does Petitioner claim that the Ninth Circuit decision in this matter conflicts with some other established precedent. Rather, Petitioner seems to suggest that the Ninth Circuit applied the correct standard of law, but simply misapplied the facts to that law. This does not warrant review.

Even if Petitioner's individual arguments are considered, as the Ninth Circuit noted, "they lack merit." (*See* Pet., App. V, p. 2).

A. Petitioner Has Not Demonstrated a Fourteenth Amendment Violation.

Although it is unclear, it appears that Petitioner claims to have been denied due process at his hearing in Paradise Valley Municipal Court and lists five specific items. (Pet., p. 8). However, there is no legal or common sense support for Petitioner's claim that he was denied his due process rights. Even if Petitioner did not get the opportunity to speak or argue his own motion to dismiss, it is beyond the pale of § 1983, as well as logic and common sense, to say that Petitioner was denied a fair hearing and suffered a constitutional deprivation, when all that occurred was that the traffic citation was summarily dismissed because the prosecutor realized Petitioner was not the driver

photographed in the speeding vehicle. (IR 129, Exhibit A, Doc. No. 000108). It is for this reason that the Ninth Circuit found that Petitioner "received all the process he was due." (Pet. App. V, p. 2).

Further, as this Court has made clear, in order to succeed on his § 1983 claim against Paradise Valley, Petitioner must meet the stringent burden of showing that Paradise Valley had an official policy or custom that directly resulted in a constitutional deprivation to Petitioner. *See Monell v. Department of Social Service of New York*, 436 U.S. 658, 690-91 (1978); *City of Canton v. Harris*, 489 U.S. 378, 387 (1989). Liability cannot attach to Paradise Valley simply because it employs an individual who allegedly committed a constitutional tort. *See Monell*, 436 U.S. at 691-94. Even if Petitioner's criticisms of the conduct of Respondent Municipal Court Judge Elsa Lynch were to be considered constitutional violations,[3] Petitioner has failed to demonstrate that these alleged constitutional deprivations resulted from an established municipal policy or custom, as opposed to a single, instant act by a singular Paradise Valley employee. Therefore, Petitioner's Writ to this Court is facially insufficient.

Equally insufficient is Petitioner's equal protection claim. To sustain such a claim against Paradise Valley, Petitioner must prove: (1) there is disparate treatment; (2) there is a burden on a fundamental right or targeting of a suspect class; and (3) there is no rational relation to some

3. Respondent Lynch, as will be explained in more detail below, has absolute immunity from Petitioner's constitutional claims against her.

legitimate end. *See Romer v. Evans*, 517 U.S. 620, 631 (1996). There simply is no disparate treatment as Paradise Valley issues its photo radar speeding citations in the same way to every person that is detected to be in violation of the speed laws, all in accordance with the express permission of Arizona's Supreme Court. The only "disparate treatment" is between vehicles that are traveling in excess of the speed laws and those that are not. However, this cannot support an equal protection claim.

Furthermore, there is no suggestion that Paradise Valley's photo radar system targets a suspect class. In addition, there is no fundamental right to drive on public highways, and there is no fundamental right to drive on these roadways in excess of the speed limit. *See Miller v. Reed*, 176 F. 3d 1202, 1206 (9th Cir. 1999).

Finally, as the District Court noted, Paradise Valley's photo radar system bears a rational relation to a legitimate end. (IR 127, p. 17). Upon implementation of the photo radar system in Paradise Valley, the number of traffic accidents dropped dramatically. (IR 102, Exhibit B). Since then, the rate of accidents has stayed relatively the same despite an ever increasing population in Paradise Valley. (*Id.*, Exhibits B, C.). The inference to be drawn from these statistics is that implementation of the photo radar system has helped reduce the rate of accidents. (IR 127, p. 17).

Simply put, Petitioner has no Fourteenth Amendment claim.

B. The Petitioner's Fourth Amendment Theory Is Without Basis.

Although equally as vague as his other claims of constitutional deprivation, Petitioner seems to suggest that his Fourth Amendment rights were violated because Paradise Valley's citation amounted to an "arrest," and was done so without probable cause. However, the issuance of a civil traffic complaint does not in any way amount to an arrest under Arizona law, because there is no physical restraint or submission to custody of a police officer. *See* A.R.S. § 13-3881(A). Moreover, there was no "seizure" under the Fourth Amendment because there was no intentional acquisition of physical control over Petitioner. *See Brower v. County of Inyo*, 489 U.S. 593, 596 (1989). It simply cannot be said that the issuance of a photo radar citation in any way amounts to a "seizure" because the person cited is never stopped or detained for any length of time, but is merely recorded photographically as committing the violation and is subsequently issued a citation in the mail. (IR 102, Exhibit A).

Even beyond the fact that a vehicle is never "stopped" when issued a photo radar citation, Arizona only requires that the issuance of a civil traffic citation be based on reasonable suspicion and there need not be a showing of probable cause. *See State v. Ochoa*, 544 P.2d 1097, 1099-1100 (Ariz. 1976); *State v. Dean*, 543 P.2d 425, 426-27 (Ariz. 1975).[4] In other words, a traffic stop is permissible in

4. Federal courts have a generally given deference to a State's determination as to the standard of suspicion necessary to support issuing a citation. *See, e.g., Easy Rider's Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1498 (9th Cir. 1996).

Arizona if it comports with the standards of this Court as established in *Terry v. Ohio*, 392 U.S. 1 (1968), i.e., a *Terry* stop may be based upon "a reasonable suspicion" and need not meet the higher standard of probable cause. *See Ochoa*, 544 P.2d at 110. *See also State v. Dean*, 543 P.2d 425, 427 (Ariz. 1975) (a founded suspicion is all that is necessary for making a traffic stop); *State v. Boudette*, 791 P.2d 1063, 1067 (Ariz. 1990).[5] In fact, because the critical inquiry here is whether the constitutional standard has been met, this Court has made it clear that a traffic stop is constitutionally permissible when based on a "reasonable suspicion." *See Berkemer v. McCarty*, 468 U.S. 420, 439 (1984); *Knowles v. Iowa*, 525 U.S. 113, 118 (1998). That standard was met here, and Petitioner does not claim otherwise. Therefore, there was no Fourth Amendment violation.

The only remaining aspect of Petitioner's Fourth Amendment claim, as far are Respondents can discern, is his allegation that he was "surrounded" by police officers at the Paradise Valley Municipal Court Clerk's Office window and that he was "in fear of his life." (Pet., p. 16). Notwithstanding the doubtful nature of this alleged constitutional violation, Petitioner did not advance below,

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5. Petitioner cites to the case of *In the Matter of the Appeal in Maricopa County Juvenile Action No. J-84984*, 674 P.2d 836 (Ariz. 1983) for the proposition that reasonable grounds/founded suspicion equates to probable cause. However, in that case the Arizona Supreme Court only decided the issue of what **standard of proof** was to be applied to the "reasonable grounds" standard. The Arizona Supreme Court did not in any way hold that the "probable cause" and "reasonable grounds to believe" standards were equivalent. Rather, the Arizona Supreme Court merely held that in the particular context of a juvenile transfer action, the preponderance of the evidence burden would be applied to both standards. *Id.* at 837-38.

and has not advanced here, any competent facts to support the requisite finding that Paradise Valley had a policy or custom for such conduct. This is fatal to Petitioner's claim. *See Monell*, 436 U.S. at 691.[6]

C. Petitioner's Thirteenth Amendment/Involuntary Servitude Claim Does Not Withstand Scrutiny.

Regarding this aspect of Petitioner's Writ, Petitioner does not provide any explanation as to how the Ninth Circuit improperly decided a question of law or issued a decision in conflict with other law. Moreover, Petitioner does not cite to any legal authority indicating that some alleged violation of the Thirteenth Amendment can form a basis for a § 1983 claim. Petitioner's conclusory allegations that he suffered a constitutional deprivation, without any analysis, fails to present an issue for this Court to review.

Finally, as with the theories advanced above, there is a complete absence of any evidence that Paradise Valley had some established policy or custom compelling individuals to appear and identify the actual driver of the speeding vehicle in contravention to the Thirteenth Amendment. *See Monell*, 436 U.S. at 690-91. In fact, the evidence actually dictates that Paradise Valley did not have any such policy or custom.

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6. Petitioner also suggests that this conduct was in violation of his Fifth, Eighth, and Fourteenth Amendment rights. However, Petitioner cites this Court to no legal authority whatsoever setting the standards for determining when a cognizable deprivation can be said to have occurred, let alone any analysis or evidence as to how his undefined rights were violated. In any event, Petitioner's argument fails because he has failed to establish the requisite element under *Monell, supra*, of an established municipal policy or custom.

On the face of the citation, itself, the person cited is given four options for resolving the citation:

1. Pay the fine or sanction in person or by mail;

2. Attend traffic safety class;

3. Appear in person to contest the violations; or

4. **If the registered owner was not the driver, identify the driver on the written citation and return by mail to Paradise Valley.**

(IR 134, Exhibit B). In light of this, the actual policy or custom of Paradise Valley is to have the identification of the actual driver be done by mail, and no appearance is necessary. Petitioner chose to ignore Option 4, but this hardly raises a constitutional issue. As such, Petitioner's claims can be summarily rejected.

III. Respondents Lynch, Johnston, And Kennedy Are Immune From Suit.[7]

With respect to Respondents Lynch and Johnston, Petitioner's argument is premised on his assumption that the

7. Petitioner does not ask this Court to determine whether Respondent Police Officer Mike Coppola was entitled to qualified immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Anderson v. Creighton*, 483 U.S. 635, 638-39 (1987) (a police officer should prevail on an assertion of qualified immunity if a reasonable police officer possessing the same information could have believed his conduct was lawful). This is because he cannot. Petitioner's claims against Respondent Coppola were dismissed with **Petitioner's agreement**. (IR 74). Therefore, Respondents need not address the immunity issue with respect to Respondent Coppola.

photo radar citation was constitutionally invalid. However, as discussed above, this is not true. Therefore, Petitioner's immunity argument fails on its face.

Independently, Petitioner refuses to acknowledge the fact that he must show a complete absence of **any** jurisdiction whatsoever before immunity will be denied to judges and judicial officers. *See Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978). If a Court had subject matter jurisdiction over an issue, then any challenged actions taken in relation to that matter fall within the grant of immunity. *Id.* at 356. Regardless of whether or not the photo radar citation issued to Petitioner turned out to be valid, the simple fact remains that the Paradise Valley Municipal Court was vested with subject matter jurisdiction over such a speeding citation. *See* A.R.S. § 28-1552(B) ("municipal courts and justice courts have concurrent jurisdiction over civil traffic violations committed within their boundaries. . . .") Because jurisdiction irrefutably exists, immunity attaches and precludes Petitioner's claims against Respondents Lynch and Johnston. *See Franceschi v. Schwartz*, 56 F.3d 828, 831 (9th Cir. 1995) (immunity still applies when judge acts in excess of jurisdiction, as opposed to in clear absence of jurisdiction."); *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986) ("judges and those performing judge-like functions are absolutely free from liability for damages for acts performed in their official capacities").

As for Respondent Kennedy, the City Prosecutor, Petitioner fails to explain why prosecutorial immunity should not attach for Respondent Kennedy's alleged act of causing a witness subpoena to be issued. This is an act intimately associated with the judicial phase of the process and is a

function which entitles Respondent Kennedy to absolute immunity from a civil suit for damages under § 1983. *See Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976); *Ashelman*, 793 F.2d at 1075. Petitioner's own allegations make clear the correctness of affording Respondent Kennedy absolute immunity.

IV. Petitioner's Request For Summary Judgment Is Not Properly Before This Court.

Before the Ninth Circuit, Petitioner did not present the issue of whether or not he should be granted summary judgment on his claims. Therefore, that issue is not properly before this Court. Regardless, as the above discussion dictates, the District Court properly granted Respondents' summary judgment and the Ninth Circuit correctly affirmed that determination. Therefore, Petitioner's argument fails on its merits as well.

CONCLUSION

Petitioner has not suffered any constitutional deprivation whatsoever. Paradise Valley's photo radar system comports with constitutional standards in all respects, and Petitioner has not demonstrated otherwise. The District Court properly found that the individual Respondents were entitled to immunity, and properly granted summary judgment to Paradise Valley. The Ninth Circuit correctly affirmed these determinations and Petitioner has not presented any compelling reason for this Court to review that determination. Therefore, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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